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THE DOCTRINE OF ENTRAPMENT WITHIN THE CANADIAN CRIMINAL JUSTICE SYSTEM

by

Ⓒ JAMES CAMPBELL JORDAN

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS

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11 Oct 83
Date

Dedicated to Bien Mark
whose encouragement and
assistance is gratefully
acknowledged.

ABSTRACT

Instigation of criminal offences by law enforcement officials or their agents amounting to entrapment is undesirable and must be controlled. A controlling mechanism or technique should both deter the continuation of the misconduct and provide a remedy to an aggrieved accused where warranted by the circumstances. The rationale for establishing a control technique and remedy has been founded upon a desire to deter law enforcement officials from the continuation of the undesirable practice of obtaining evidence upon which to prosecute the accused through instigation of the offence itself. Additionally, the remedy has been founded upon a reluctance on the part of the courts to lend their processes to a procedure which places the integrity of the courts in jeopardy and, further, from a sense of unfairness arising from a situation wherein an accused who would not have committed the offence but for the intervention and instigation of the law enforcement official acting on behalf of the government is subsequently prosecuted for the instigated offence by that same government.

This thesis will examine the appropriateness of existing techniques for differentiating between the acceptable lawful activity of merely providing an opportunity for an individual to commit an offence and the actual instigation of the criminal offence by the law enforcement official or his agent. The existing approaches are determined to be inadequate and an alternative comprehensive test is suggested.

Entrapment has, in certain jurisdictions, been endowed with all the trappings of a substantive defence and, therefore, this thesis will proceed to examine the theoretical basis upon which such a defence is professed to be founded, the classes of offences to which a defence of entrapment would be available, and whether the determination of entrapment is an issue of law for the judge or an issue of fact for the consideration of the jury.

Following a discussion of the availability of existing remedies for a defence of entrapment it is concluded that such remedies are not available for a defence of entrapment within the Canadian criminal justice system, with the exception of the power of the court to mitigate penalty where it is appropriate n the circumstances. In the alternative, it is concluded that if such remedies are available they would not serve as an effective means of disuading law enforcement officials or their agents from continuing the objectionable practice of instigating a criminal offence in order to prosecute the accused.

Alternative methods of obtaining the desired objective are examined with the consequent conclusion that no single technique is sufficient in itself. It is determined that the objectives are most satisfactorily served by a compromise involving the prosecution of the offending law enforcement official or agent, which serves as a deterrent to the continuation of the undesirable conduct, and the prosecution of the accused individual with the fact of entrapment being relevant to mitigation of sentence in appropriate circumstances, thus alleviating the sense of injury or injustice on the part of a not altogether blameless accused. Such a method is designed to maintain public confidence in the criminal justice system and protect the integrity of the courts as the offending official is properly sanctioned and an admittedly guilty

offender is not acquitted but rather is sentenced having regard to all relevant surrounding circumstances.

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"Our way of upholding the Constitution
is not to strike at the man who breaks
it, but to let off somebody else who
breaks something else..."

-Wigmore, Treatise on Evidence
(3rd ed., 1940, para. 2184)

CHAPTER ONE

INTRODUCTION AND DEFINITION OF THE DOCTRINE OF ENTRAPMENT

Disagreement among the various provincial and appellate courts, the Supreme Court of Canada, and the members of these courts have rendered them incapable of arriving at a clear decision as to whether a doctrine of entrapment should exist in law in Canada and, if in fact it should exist, the rationale and theoretical basis upon which it is to be established. This thesis will, by an examination of the opposing viewpoints which have developed, attempt to determine the appropriateness and necessity of a doctrine or defence of entrapment within the Canadian criminal justice system. Further, an attempt will be made to determine whether such a proposed doctrine has any support or basis in statute, judicial decisions, or established and accepted principles of criminal law.

An examination of the American, British, and New Zealand experiences will be of assistance as being illustrative of the opposing positions which are often wholly contrary in their conclusions relevant to the issues which have yet to be satisfactorily dealt with by the Canadian judiciary.

The commonly accepted statement of the doctrine in the United States is found in the decision of Mr. Justice Roberts in Sorrells v.

United States[1] wherein he defined entrapment as follows:

> Entrapment is the conception and planning of an offence by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.

However, such a definition does not appear to have application to the doctrine of entrapment as perceived by its Canadian proponents. As will subsequently be indicated in an examination of the recent decision of the Supreme Court of Canada in Amato v. The Queen,[2] a case in which the facts, substituting drugs for alcohol, are "remarkably similar" to those in Sorrells v. United States,[3] persistent solicitation or persuasion does not render the defence available in Canada, assuming it to exist in law. It therefore becomes necessary to differentiate between permissible law enforcement investigative techniques and those procedures which could be perceived as constituting entrapment.

Law enforcement agencies may of necessity require the use of spies, informers, decoys, undercover agents and agents provocateurs. The nature of the offence being investigated and the reality of the situation may demand such methods. It is with the use of the agent provocateur that the doctrine of entrapment is principally directed.

In R. v. Mealey and Sheridan[4] the Lord Chief Justice defined an agent provocateur as,

> ...a person who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds or informs against him in respect of such offence.

---

[1] 287 U.S. 435 at 454 (1932)

[2] (1982) 42 N.R. 487 (S.C.C.)

[3] Ibid., at 508, in the dissenting judgement of Estey J.

[4] 60 Crim. App. R. 59 at 61, quoting from the Report of the Royal Commission on Police Powers and Procedures, (1929)

However, the Canadian authorities tend to employ the term loosely to refer to undercover officers or their agents.[5] For the purpose of the discussion of entrapment the term agent provocateur will be employed as having the meaning attributed to it by the above reference to His Lordship's judgement.

The necessity of employing an agent provocateur was recognized in R. v. Timar[6] wherein District Court Judge Dumont indicated as follows:

> Our laws have long recognized the necessity to employ 'agent provocateurs' for the protection of society. This is primarily due to the existence of types of offences, the detection of which would, without such 'police traps' as they have been called, be virtually impossible, and these special methods need to be employed if these crimes are to be controlled.

Chief Justice Laskin, in R. v. Kirzner,[7] expressed his view of the employment of such investigative techniques, in obiter dicta, in the following terms:

> The use of spies and informers is an inevitable requirement for detection of consensual crimes and of discouraging their commission....Such practices do not involve such dirty tricks as to be offensive to the integrity of the judicial process. Nor can objection on this ground be taken to the use of decoys who provide the opportunity to others intent upon the commission of a consensual offence. In all such cases, the offender can claim no extenuation that would mitigate either his culpability or the use of evidence to establish it or his punishment upon conviction.
>
> The problem which has caused judicial concern is the one which arises from the police-instigated crimes, where the police have gone beyond mere solicitation or mere decoy work and have actively organized a scheme of ensnarement or entrapment, in order to prosecute the person so caught. In my opinion it is only in this situation that it is proper to speak of entrapment and to consider what effect this should have on the prosecution of a person who has thus been drawn into the commission of an offence.

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[5] R. v. Bonnar (1975) 14 N.S.R. (2d) 365, 11 A.P.R. 365, 34 C.R.N.S. 182 (N.S. S.C., App. Div.)

[6] [1969] 3 C.C.C. 185 at 188

[7] [1978] 2 S.C.R. 487 at 493-4, 18 N.R. 400 (S.C.C.).

Chief Justice Laskin indicated in R. v. Kirzner that there must be evidence the law enforcement official or his agent instigated the offence charged and had such instigation not occurred the accused would not have committed the offence.[8]

Mr. Justice Estey, in Amato v. The Queen, observed that the move from passive to active law enforcement investigative techniques both raised new issues and aggravated problems surrounding older issues.[9] He perceived the principal elements or characteristics of entrapment to be as follows:[10]

> ...that an offence must be instigated, originated or brought about by the police and the accused must be ensnared into the commission of the offence by the police conduct; the purpose of the scheme must be to gain evidence for the prosecution of the accused for the very crime which has been so instigated; and the inducement may be but is not limited to deceit, fraud, trickery or reward, and ordinarily but not necessarily will consist of calculated inveigling and persistent importuning....In the result, the scheme so perpetrated must in all the circumstances be so shocking and outrageous as to bring the administration of justice into disrepute.

The doctrine of entrapment should not be concerned with acceptable law enforcement practices of employing decoys and undercover agents but rather with those instances wherein the accused has been induced or incited to commit an offence which, but for the instigation of the law enforcement officials or their agents, would not have been committed.

It is acknowledged that the distinction between providing an opportunity to commit an offence and the actual instigation of the offence is blurred as it corresponds to no clear factual situation[11] and, at best will be difficult to determine. However, the difficulty in arriving at a satisfactory standard for the determination of the existence of entrapment should not discourage the effort.

---

[8] Ibid., at 487
[9] Supra, n. 3 at 535-6
[10] Ibid., at 523-4, in his dissenting opinion with Laskin C.J.C., McIntyre and Lamer J.J. concurring.

It has been suggested that the use of decoys in the purchase of drugs by an undercover law enforcement official or his agent from a suspected dealer in restricted drugs is a form of entrapment which is not necessarily improper.[12] However, for the purpose of this examination of the doctrine of entrapment the concept will be more narrowly confined to that unacceptable or intolerable practice of instigation of criminal offences by law enforcement officials or their agents. Entrapment, therefore, will be limited to those situations wherein an offence in all probability would not have been committed by the accused but for the intervention of a law enforcement official or his agent, extending beyond mere solicitation or decoy work, resulting in the instigation or inducement of the commission of the offence by a scheme or a method which is in all circumstances "so shocking and outrageous as to bring the administration of justice into disrepute."

As Parliament did not statutorily provide for a defence of entrapment in the Criminal Code, the defence, if it exists at all, must, of necessity, be brought before the court pursuant to section 7(3) of the Criminal Code which provides as follows:

> Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered

---

[11] J. D. Heydon "The Problems of Entrapment" [1973] C.L.J. 268 at 284

[12] M. L. Friedland "Controlling Entrapment" (1982) 38 Univ. of T. L.J. 1 at 3

> by or are inconsistent with this Act or any other Act of the Parliament of Canada.

Although the precise terms of the section are limited to federal legislation it has been suggested by M. L. Friedland that if the defence of entrapment is accepted with respect to federal statutes there is little doubt that it would also be applied by the courts to provincial legislation.[13] However, such an interpretation is inconsistent with the clear provisions of section 7(3) and, in all likelihood, any defence introduced pursuant to this section would be limited to federal legislation.

It is also possible to interpret the provisions of section 7(3) as having application only to those defences which were recognized in law at the time the Criminal Code was enacted in 1892, which obviously precludes a defence of entrapment.[14] In order to succeed in introducing the defence of entrapment into the Canadian criminal justice system, although limited to federal legislation, section 7(3) would have to be given the liberal interpretation afforded to it by Chief Justice Laskin, in R. V. Kirzner,[15] as follows:

> I do not think that s. 7(3) should be regarded as having frozen the power of the Courts to enlarge the context of the common law by way of recognizing new defences, as they may think proper according to the circumstances that they consider may call for further control of prosecutorial behaviour or of judicial proceedings.

Mr. Justice Estey, in Amato v. The Queen, concurred with this view indicating that it was appropriate that the common law should be permitted to develop new defences not inconsistent with the provisions of the Criminal Code in appropriate circumstances, including the

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13. Ibid., at 18
14. Ibid., at 18
15. Supra, n. 7 at 496

defence of entrapment.[16]

However, Mr. Justice Estey further indicated that the doctrine of entrapment, if it constituted a defence in the traditional sense of the term, would normally lead to an acquittal, a remedy which he indicated is not appropriate in the circumstances involving entrapment. He concluded as follows:[17]

> ...as will be seen later, the successful application of the concept of entrapment leads to a stay of prosecution, the court withholding its processes from the prosecution on the basis that such would bring the administration of justice into disrepute. This is an exercise of the inherent powers of the courts. Entrapment is not in a traditional sense a defence....Therefore, for this technical reason, it may not be necessary to invoke s. 7(3) other than to illustrate by analogy the continuing flexibility of the criminal law within and without the Criminal Code.

As will be indicated subsequently, a stay of proceedings appears to be neither available to a defence of entrapment within the Canadian criminal justice system nor, in any event, is it an appropriate remedy.

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16. *Ibid.*, at 522-3
17. *Ibid.*, at 523

CHAPTER TWO

RATIONALE FOR DEVELOPING A CONTROL MECHANISM AND REMEDY FOR ENTRAPMENT

The justification or rationale for developing a doctrine or defence of entrapment falls into three primary categories. The first rationale upon which it was attempted to establish the doctrine of entrapment was that to permit the prosecution of an accused who committed an offence at the instigation of a government law enforcement official would be contrary to public policy. Secondly, that the integrity of the court would be adversely affected if it were to lend its processes to the prosecution of such an accused. Finally, that the purpose of developing a doctrine or defence of entrapment is to control the undesirable or intolerable conduct amounting to entrapment on the part of the law enforcement officials and their agents.

In an early American decision of Board of Commissioners of Excise v. Backus,[18] the New York Supreme Court expressed as a rationale for the rejection of entrapment as a defence that such a plea "has never...availed to shield crime...and it is safe to say that under any code of civilized...ethics, it never will." Either the learned justice erred in his prediction or the American courts ceased to operate under a civilized code of ethics for an opposing view was expressed a short time later by the Michigan Supreme Court in Saunders v. The People[19] which founded its acceptance of the defence upon public policy.

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[18] 29 How. Pr. 33 at 42 (N.Y. S.C.) (1864)
[19] 38 Mich. 218 at 222 (Mich. S.C.) (1878)

Mr. Justice Marston, in delivering the judgement of the court, stated the rationale for the decision in the following terms:

> Some courts have gone a great way in giving encouragement to detectives, in some very questionable methods adopted by them to discover the guilt of criminals; but they have not yet gone so far, and I trust never will, as to lend aid or encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crimes, in order that they may arrest and have them punished for so doing...Human nature is frail enough at best, and requires no encouragement in wrong-doing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation. Desire to commit crime and opportunities for the commission thereof would seem sufficiently general and numerous, and no special efforts would seem necessary in the way of encouragement or assistance in that direction.

The earliest reported case considering the defence of entrapment in the Federal Courts of the United States is United States v. Whittier[20] wherein it was stated:

> No court should, even to aid in detecting a suspected offender, lend its countenance to a violation of positive law, or to contrivances for inducing a person to commit a crime. Although a violation of law by one person in order to detect an offender will not excuse the latter, or be available to him as a defence, yet resort to unlawful means is not to be encouraged. When the guilty intent to commit has been formed, anyone may furnish opportunities, or even lend assistance, to the criminal, with the commendable purpose of exposing and punishing him.

This approach, similar to that which was later to be instituted in England, is consistent with principles of criminal law establishing culpability and yet recognizes that, although the undesirable police conduct offers no defence to the accused for his intentional commission of the prohibited act, the misconduct itself is neither to be encouraged nor tolerated. From this commendable approach the American courts began to digress with such decisions as United States v. Healey[21] which is the first reported decision wherein the United States Federal Court accepted a defence of entrapment resulting in the acquittal of the accused. The court indicated the basis of its ruling as follows:

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[20] 28 Fed. Cas. 591 at 594 (1878)

> Decoys are permissible to trap criminals, but not to create them; to present opportunity to those having intent to or willing to commit crime, but not to ensnare the law-abiding in unconscious offending. Where a statute, as here, makes an act a crime regardless of the actor's intent or knowledge, ignorance of fact is no excuse if the act be done voluntarily; but when done upon solicitation by the government's instrument to that end ignorance of fact stamps the act as involuntary, and excuses, or at least estops the government from a conviction. In the former case the actor is bound to know the facts, and acts at his peril. In the latter case he is relieved of the obligation by the government's invitation, which is of the nature of fraudulent concealment and deceit, and, if not consent, yet doth work an estoppel. Though the seller has violated the statute, he was the passive instrument of the government, and his is a blameless wrong for which he cannot be justly convicted.

This concept that the accused's intentional commission of a criminal offence can be interpreted as constituting a "blameless wrong" fails to consider the moral as well as the legal culpability of the accused. The accused had knowledge that he was violating the law yet willfully committed the prohibited act at the urging of his partner. Had his partner in crime been other than a law enforcement official there would be no question of hesitation in attributing to the accused full moral and legal culpability for his actions. One must wonder why the accused should be considered any less blameworthy because, unknown to him, the person urging the commission of the offence was an official of the government.

The decision of United States v. Healey was quickly followed by Woo Waie v. United States[22] wherein it was held that public policy can be served only by denying the criminality of the accused individual who was induced to commit an act which infringed the letter of the criminal statutes.

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[21] 202 Fed. 349 at 350 (Dist. Mont.) (1913)
[22] 223 Fed. 412 at 415 (6th Cir. Crt.) (1915)

The public policy was stated in more specific terms by Mr. Justice Sanborn of the United States Federal Court in the decision of Butts v. United States,[23] as follows:

> The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.

It is common ground that the conduct with which the doctrine of entrapment is concerned is the manufacturing or instigation of crime by law enforcement officials or their agents. However, the American courts are unable to agree upon the proper theoretical foundation, the limitation or application of the doctrine. This divergence of opinion on all matters with the exception of the necessity to condemn government instigated offences[24] is obvious in such decision as Sorrells v. United

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[23] 273 Fed. 35 at 38 (8th Cir. Crt.) (1921)

[24] United States v. Russell 411 U.S. 439 (1973), in the dissenting judgement of Stewart J. See also Lopez v. United States 373 U.S. 427 at 434 (1963) wherein the United States Supreme Court stated that "the defence of entrapment is concerned with the manufacturing of crime by law enforcement officials and their agents."; People v. Moran 1 Cal. 3d 755, 83 Cal Rptr. 411, 463 P. 2d 763 at 765-6 wherein the Supreme Court of California held that the defence of entrapment in California was not "based on the defendant's innocence." They concluded as follows: "The courts have created the defence as a control on illegal police conduct out of regard for the court's own dignity, and in the exercise of its power and the performance of its duty to formulate and apply proper standards for judicial enforcement of the criminal law."; and People v. Benford 51 Cal. 2d 1 at 9, 345 P. 2d 928 at 933.

States. The circumstances indicate that the accused was persuaded to sell a quantity of whisky to an undercover government agent at the request of the agent who relied upon friendship, common war experience, and persuasion to induce the violation of the Prohibition Act.

Chief Justice Hughes, in delivering the judgement of the court expressed the view that such an extreme abuse of authority deserves the severest condemnation but further indicated that the "question whether it precludes prosecution or affords a ground of defence, and if so, upon what theory, has given rise to conflicting opinions."[25] The rationale for the majority decision in Sorrells v. United States was based on a statutory interpretation wherein it was determined that Congress could not have intended the offence to operate against an accused who committed the offence charged as a result of the instigation of the government's own law enforcement officials. Although the theoretical basis is stated in terms of legislative intent, the rationale for establishing this fictional statutory interpretation is the desire to control misconduct on the part of those who have been authorized to enforce the law.

Mr. Justice Frankfurter, in delivering a dissenting opinion in the United States Supreme Court decision of Sherman v. United States,[26] stated his view of the rationale for a defence of entrapment in the following terms:

> The courts refuse to convict an entrapped defendant...because, even if his guilt be admitted the methods employed on behalf of the government to bring about conviction cannot be condoned.

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[25] Supra, n. 1 at 441

[26] 356 U.S. 369 at 380 (1956)

He further indicated that in a situation where the accused's conduct includes all the necessary elements to constitute criminality and where he without compulsion and "knowingly" violated the statutory prohibition, if he is to be relieved of the consequences,[27]

> ...it is on no account because he is innocent of the offence described. In these circumstances, conduct is not less criminal because the result of temptation, whether the temptor is a private person or a government agent or informer.

Therefore, the court refused to convict the accused who had been entrapped, not because his conduct fell outside the parameters of the proscription of the statute, but rather because the methods of the government that violated rationally vindicated standards of justice could not be countenanced. He concluded as follows:[28]

> Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.

If Mr. Justice Frankfurter's rationale in Sherman v. United States is accepted, then, in effect, it is the conduct of the law enforcement officials which must be controlled, and any defence of entrapment, exclusionary rule of evidence, stay of proceedings, or any other control technique must rationally be directed towards that of controlling the undesirable conduct. Therefore, one must consider which method or combination of methods will most effectively achieve the desired objectives and yet be in keeping with the philosophy of the Canadian criminal justice system.

Although having long expressed disapproval of the use of agent provocateurs,[29] the English courts have not gone so far as to suggest that the accused who has been induced to commit a criminal offence as the result of official instigation should be able to raise the fact of entrapment as a defence to the offence charged. They are prepared to go no further then permit the facts surrounding the commission of the offence to be considered as relevant to the sentencing process.[30] Chief Justice Widgery, in R. v. Mealey and Sheridan,[31] indicated the rationale for the English position as follows:

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[27] Ibid., at 380
[28] Ibid., at 380

> '...it is in our judgement quite clearly established that the so-called defence of entrapment, which finds some place in the law of the United States of America, finds no place in our law here. It is abundantly clear to the authorities, which are uncontradicted on this point, that if a crime is brought about by activities of someone who can be described as an agent provocateur, although that may be an important matter in regard to sentence, it does not affect the question of guilty or not guilty.

Lord Diplock reaffirmed the earlier English decisions when he indicated in R. v. Sang[32] "that there is no defence of 'entrapment' known to English law," and based his opinion upon the following rationale:33

> Many crimes are committed by one person at the instigation of others. From earliest times at common law those who counsel and procure the commission of the offence by the person by whom the actus reus itself is done have been guilty themselves of an offence, and...can be tried, indicted and punished as principal offenders. The fact that the counsellor and procuror is a policeman or a police informer, although it may be of relevance in mitigation of penalty for the offence, cannot affect the guilt of the principal offender; both the physical element (actus reus) and the mental element (mens rea) of the offence with which he is charged are present in his case.

In regard to the contention that the courts have a discretion to acquit an accused of any offence in which the conduct of the law enforcement official incurs their disapproval, Lord Diplock expressed the following opinion:[34]

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[29] See Brannon v. Peek [1947] 2 All E.R. 572 (K.B.); and R. v. McEvilly; R. v. Lee (1973) 60 Cr. App. R. 150

[30] Supra, n. 5

[31] Ibid., at 62

[32] [1979] 2 All E.R. 1222 at 1226

[33] Ibid., at 1226

> The conduct of the police where it has involved the use of an agent provocateur may well be a matter to be taken into consideration in mitigation of sentence; but under the English system of criminal justice it does not give rise to any discretion on the part of the judge himself to acquit the accused or to direct the jury to do so, notwithstanding that he is guilty of the offence.

It has been suggested[35] that the decision in R. v. Sang was a "profound disappointment" as their Lordships failed to respond to the problem of offences instigated by law enforcement officials and instead "trotted out the old standbys - mitigation of sentence, disciplinary actions and the possibility of prosecuting the instigator." Further, the question was raised of whether such remedies will effectively control unacceptable police conduct and redress grievances of the entrapped accused.

In perceiving the decision as a "profound disappointment," there is the obvious implication that the above query was answered in the negative, that the "old standbys" are not capable of adequately controlling entrapment and providing a remedy to an aggrieved accused. These remedies will be among those which will subsequently be examined in order to determine the most effective remedy or combination of remedies to achieve the desired objective.

The position of the Canadian judiciary on the doctrine of entrapment is unsettled. In R. v. Bonnar,[36] one of the few reported decisions to expressly accept the existence of a defence of entrapment in Canada, the Nova Scotia Supreme Court, Appeal Division, rationalized their position on the basis that the conduct of the law enforcement officials amounted to "calculating, inveigling, and persistent importuning" which constitutes entrapment as it "strikes at the very foundation of the system and administration of criminal justice in a free and democratic society and just cannot be permitted or condoned."

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[34] Ibid., at 1227

[35] E. Oscapella "A Study of Informers in England" [1980] Crim. L.R. 136 at 142

[36] Supra, n. 5 at 192

In Kirzner v. The Queen,[37] Chief Justice Laskin expressed a need for a balance between necessary and reasonable latitude in employing stratagems to control the spread of crime and the need to control the conduct of the law enforcement officials which extends beyond any reasonable latitude. He indicated that the courts must be concerned with the,

> ...proper interpretation and application of the criminal law invoked against the accused persons, with the propriety of the conduct of the prosecution and of the defence, especially in light of the fundamental principle of the presumption of innocence, and in this connection, with the behaviour of the police authorities in respect of their dealings with an arrested or about-to be arrested accused.

Mr. Justice Estey, in delivering the dissenting opinion in Amato v. The Queen, perceived the doctrine of entrapment as an "offset to or a control mechanism for overzealous crime detection and prosecution" in circumstances where the law enforcement official induces or incites an otherwise innocent individual to the commission of an offence.[38] He compared the necessity for a doctrine or defence of entrapment to the need for a rule governing the exclusion of involuntary confessions as the "integrity of the criminal justice system demands the rule." He further indicated[39] the necessity for such a control device within the criminal justice system,

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[37] Supra, n. 7 at 492
[38] Supra, n. 2 at 507

> ...which will not expose the community to the spectacle of a person being convicted of a crime, the commission of which in substance was the work of the state itself.

A consideration of equal importance is the danger to the integrity of the courts in exposing the community to the spectacle of the court acquitting or staying the prosecution of an admittedly guilty individual who has committed all the constituent elements of the offence charged, while failing to sanction the offending law enforcement officer. The integrity of the court cannot be maintained by employing a policy that "two wrongs," an accused who has committed the constituent elements of an offence and a law enforcement officer who incited the commission of the offence, somehow cancel one another's effect, to create a "right." Public confidence can be maintained by properly applying the principles of criminal law and sanctioning both wrongdoers appropriately. This can be accomplished by registering a conviction against the accused and mitigating the sentence where the circumstances warrant it, and by prosecuting the offending officer who incited the offence.

In response to the desirability of creating a substantive defence of entrapment, one commentator has suggested that it may be arguable that those instances involving the most blatant forms of official incitement demand extreme measures and to "emphasize the extent of disapproval a complete defence must be provided."[40] He expressed the view that this would be the most effective method of dissuading misconduct on the part of the law enforcement officials and also maintain public confidence in the system. However, he further indicated that a more extensive employment of the defence of entrapment might "unduly inhibit the necessary use of informers and traps..." and concluded as follows:[41]

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[39] *Ibid.*, at 524

[40] K. J. M. Smith "The Law Commission Working Paper No. 55 on Codification of the Criminal Law, Defences of General Application; Official Instigation and Entrapment" [1975] Crim. L.R. 12 at 20

> An across-the-board availability of the defence might well appeal to some sense of purity and incorruptability of principle, but what is undeniable is that in many situations substantial moral guilt will attach to the behaviour of the defendant and complete acquittal will not be appropriate nor even demanded by any sense of fairness. One is therefore inclined to agree with the report that a defence of entrapment should not embrace all cases of unacceptable police behaviour.

He continued[42] by indicating that in cases where it is clearly established that criminal behaviour has been officially instigated the accused should be able to avail himself of a defence of entrapment, and further that:

> Public confidence is an essential lubricant to any machinery of justice and when dealing with such a commodity it is preferable to err on the generous side.

The difficulty with this approach is that it acknowledges that there are circumstances involving "substantial" moral guilt, undoubtably as opposed to those situations involving a lesser degree of moral culpability, wherein a defence of entrapment is to have no application, but yet allows an accused to avail himself of the benefits of a complete substantive defence in those latter situations where the accused has a lesser degree of moral culpability. Logically this gradation or variation in degree of moral culpability could more properly be recognized and dealt with in the sentencing process resulting in certain instances in an absolute discharge thereby recognizing the fact of the accused's intentional commission of the prohibited act but also considering the degree of inducement or instigation.

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[41] Ibid., at 20
[42] Ibid., at 21

In England the Law Commission in its Report on Defences of General Application[43] indicated that at first glance there appears to be strong arguments favouring the creation of a defence of entrapment as an effective means of marking the disapprobation with which such conduct is regarded, as well as solving some of the difficulties surrounding mitigation of sentence and discretion as to the admissibility of evidence. Additionally, a defence would be equally applicable in respect to the activities of both law enforcement officials and their agents, whereas the present internal disciplinary procedures are applicable only to the officials.

However, the Law Commission rejected as unsound the assumption that the conduct of law enforcement officials and their agents are in certain instances so intolerable that the accused ought in justice to be absolved from criminal liability, and further, that such unacceptable official misconduct can only be curtailed by the provisions of a substantive defence was rejected as equally unsound.[44] The Law Commission indicated the rationale for their conclusion in the following terms:

> A defendant who would not have committed an offence but for inducement by others to do so is, in respect of the actus reus and any necessary mens rea, in no different position from any other criminal; he has committed the offence. Whether the inducement came from fellow-criminals or from any other source can from the point of view of his guilt make no difference, except, perhaps, in the hypothetical case of a

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[43] The Law Commission (Law Com. No. 85) Criminal Law, Report on Defences of General Application, (1977) at 46

[44] Ibid., at 46

> police officer inciting, openly in his capacity as a police officer, the commission of an offence. It is true that, when committing an offence under duress, the defendant is also usually regarded as possessing the necessary mens rea, but in such a case he is absolved from liability because of the overwhelming pressure directed against him. Normally no such pressure is involved in cases of entrapment. From his viewpoint, then, a defence of entrapment where the inducement alleged is solely that of the police or informers corresponds with no moral distinction in his behaviour. It appears to us that the proponents of the defence of entrapment seek to control admittedly unacceptable conduct on the part of the State's law-enforcement agencies, not by penalizing them or otherwise preventing the repetition of such conduct, but by absolving the defendant. This is in our view illogical. A proper reflection of the defendant's guilt in any case of entrapment, whether or not officially inspired, can be effected by the practice of mitigating the penalty and if entrapment is clearly the result of conduct by the police or informers, that mitigation may in an appropriate case extend so far as an unconditional discharge.[45]

A. J. Ashworth[46] indicated that he had some difficulty in accepting the Law Commission's rejection of a substantive defence of entrapment on the basis that a defence would be ineffective in discouraging entrapment techniques as, in his view, "general defences are usually justified in terms of the defendants culpability or responsibility." However, what the Law Commission was suggesting is that a defence of entrapment cannot be justified in terms of the defendant's culpability. The Law Commission dealt with this aspect of the issue by indicating that an accused who would not have committed the offence charged but for the inducement of another is, in respect of the constituent elements of the offence, in no different position from any other criminal as he has committed the prohibited act.

He contended that the Law Commission supported their conclusion by three basic reasons which he expressed in the following terms:

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[45] Ibid., at 47

[46] A. J. Ashworth "Entrapment" [1978] Crim. L.R. 137 at 138

(1) entrapment does not affect either the actus reus or the mens rea of the crime committed,
(2) defendants are sometimes induced by 'fellow criminals' to commit crimes and the fact that the inducement comes from an agent provocateur "corresponds with no moral distinction in the defendant's behaviour"; and
(3) where there is an element of entrapment its effect on culpability can be taken into account by the court when sentencing.[47]

Ashworth contended that the first point is not conclusive nor perhaps relevant as neither the defences of duress nor necessity negative actus reus or mens rea but such does not reduce their effectiveness as defences.[48]

It is suggested, however, as it was by the Law Commission, that the defence of duress absolves an accused from criminal liability because of the overwhelming pressure arising from the threat of immediate serious injury directed towards him, and that no such pressure is involved in cases of entrapment.[49] Further, an accused is not held to be culpable in cases where the defence of necessity is applicable as a greater harm is being prevented than that which was committed and, additionally, there was no other recourse open to the accused.

In the case of entrapment there does not exist these redeeming features capable of absolving the accused from criminal liability notwithstanding the presence of all constituent elements of the offence. Certainly, the mere fact that the accused was induced by another who, in the case of entrapment, was a law enforcement official or his agent, cannot absolve him from liability. At best such a factor would only be relevant to the mitigation of the penalty imposed following conviction.

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[47] Ibid., at 138
[48] Ibid., at 138
[49] Supra, n. 43 at 47

Ashworth responded to the second point raised by the Law Commission that there exists no moral distinction between an accused induced by a "fellow criminal" and one induced by a law enforcement official to commit the offence charged by stating as follows:[50]

> It could be said to make little difference to his culpability, for in either case he shows himself to be open to suggestions of lawbreaking. But it may make a crucial difference to whether the offence occurs at all....Is it not arguable that to convict someone for succumbing to temptation from official sources which might otherwise never have been offered is an abuse of the law?

As Ashworth had previously indicated, general defences are usually based upon the accused's culpability and responsibility and as he further indicated, the fact of official inducement "could be said to make little difference to his culpability."[51] Furthermore, his contention that the fact of official involvement should have the effect that the offence did not occur is illogical having regard to the completed actus reus and mens rea by the accused.

In regard to the third point relating to mitigation of sentence, Ashworth expressed the opinion that such a basis is inconclusive as any excuse or justification could be taken into account at the sentencing stage,[52]

> ...but the real issue is whether someone who was entrapped into committing an offence deserves the stigma of a criminal conviction.

Obviously, by rejecting the Law Commission's third point he was concluding that such an accused would not be deserving of a criminal conviction by reason of being induced to commit the offence charged.

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[50] Supra, n. 46 at 138-9
[51] Ibid., at 138
[52] Ibid., at 138

It is difficult to agree with such a conclusion for, as previously indicated, there is no moral distinction between an individual induced to commit an offence by a law enforcement official or his agent or one induced by a fellow criminal, which is in fact what he perceived the official to be at the time of the commission of the offence.

One author,[53] indicating that the only effective method of controlling unacceptable misconduct of law enforcement officials in their use of entrapment techniques, and consequently, implying that the proper focus should be upon controlling the undesirable practices of officials, is to deny them the use of evidence improperly obtained concluded as follows:

> Even if one takes a rather narrow approach, arguing that entrapment is sui generis, and not to be lumped together with more general problems of controlling the methods by which the police investigate crime and collect evidence, there is still a strong case for legislative intervention. This narrower approach would focus more on the issue of justice to the accused then on the issue of police behaviour, and would argue that a man who, without any prior propensity to commit the crime with which he is charged, is in effect seduced or coerced into committing it by a police officer or police agent, is not in truth a criminal at all, and ought to have available to him a substantive defence recognizing this fact.

Of course it is difficult to perceive of an individual having committed the actus reus with the necessary mens rea, and who has been persuaded to become involved in an offence by a law enforcement official to be "not in truth a criminal at all" when he would be considered a criminal under the same circumstances with the exception that the persuasion was by one other than an official involved in law enforcement.

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[53] J. C. Levy "Police Entrapment - A Note on Recent Developments" [1970] Sask. L. Rev. 180 at 190

Obviously one of the primary reasons for the disagreement as to the appropriate definition for entrapment is this difficulty in arriving at a consensus as to the rationale for the doctrine. These essentially different views are represented in United States v. Sorrells wherein,[54]

> ...the majority sees it as a defence for a generally innocent offender, the minority considers it a control upon police excesses similar to the search and seizure exclusionary rule, with only indirect concern for the offenders innocence.

It has been suggested that this divergence of opinion as to the rationale for the doctrine of entrapment is reflected in the following manner:[55]

> Formulation which emphasizes the inducement reflects a prime concern for the general innocence of the offender....Formulations which speak of an objective norm below which the police may not go, regardless of effect, reflect prime concern with the regulation of police practice. These two purposes - innocence of the offender and regulation of police conduct - are central to all formulations. A third purpose occasionally ennunciated, usually in connection with that of regulating police conduct, is the preservation of the purity of the courts. It is more realistic to consider 'purity of courts' argument... as means to effectuate the 'control of police' purpose rather than as seperate purposes in themselves.

It has further been suggested that it is not surprising that disagreement remains in the formulation of the entrapment test as such formulations are directed towards different "evils." It has been further indicated as follows:[56]

> Of course one formulation may attempt to serve both ends, and several of the formulations are directed to multiple purposes. But it seems clear that no one entrapment test will satisfy the advocates of all these views.

It is concluded that the majority of the suggested control techniques and remedies focus to narrowly upon a single aspect of the problem presented by entrapment depending upon the perspective or rationale of those advocating the procedure. However, any proposed system or method of controlling entrapment must effectively respond to all aspects of the problem.

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[54] Daniel L. Rotenberg "The Police Detection Practice of Entrapment" (1969) 49 Virginia L. Rev. 871 at 893

[55] Ibid., at 896-7

[56] Ibid., at 897

It is not inconceivable that a system of control serving the objective of discouraging misconduct by law enforcement officials and their agents could not exist contemporaneously with a remedy designed to meet the requirements of an agrieved accused who finds himself the focus of an entrapment practice.

CHAPTER THREE

THEORETICAL BASIS FOR A DEFENCE OF ENTRAPMENT

It is essential to differentiate between the rationale or policy reasons for the doctrine of entrapment and the actual theoretical basis upon which the doctrine may be established. It has been suggested that "...public policy may explain why the defence is desirable but it cannot allow the plea."[57] A summary of the various theoretical bases which have been proffered as a foundation upon which to establish a defence of entrapment or upon which to entertain the plea are indicated as follows:[58]

> Basic considerations of substantive and procedural law arise in the conflict between the various competing theoretical foundations for the doctrine. The Supreme Court of the United States of America by a complex process of statutory interpretation has refused to apply penal statutes against entrapped defendants and has enamoured the doctrine with all the trappings of a substantive defence including the right to jury determination. The Court of Appeals in the same jurisdiction, attracted more to the dissenting judgements of a number of Supreme Court Judges, has preferred to invoke inherent procedural powers authorising the dismissal of indictments founded on entrapment facts. The Court Martial Appeal Court in Northern Ireland, the Court of Appeal of New Zealand and the Central Criminal Court of London has reasserted the traditional supervisory powers over the trial and recognized a discretion to exclude prosecution evidence obtained through entrapment. Some lower courts in Canada have ordered a stay of proceedings because the foundation of the prosecution has been the entrapment of the accused. The English Court of Criminal Appeal has variously approved and condemned the practice and in its less opprobious moods halved and even cancelled sentences imposed upon entrapped offenders.

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[57] John David Watt "The Defence of Entrapment" (1970-1) 13 C.L.Q. 313 at 333

[58] N. L. A. Barlow "Recent Developments in New Zealand in the Law Relating to Entrapment" (Part 1) [1976] N.Z. L.J. 304 at 305-6. See also Part 2, [1976] N.Z. L.J. 328

This thesis will examine many of the theoretical foundations for the doctrine in order to determine which of them is appropriate within the Canadian criminal justice system. Glanville Williams has indicated, in reference to the defence of entrapment, that "there is no other ready-made doctrine to cover the situation,"[59] and Professor William E. Mikell, in discussing the doctrine of entrapment within the Federal Courts of the United States, suggested that,[60]

> In truth there seems to be no rational basis for the doctrine. Its origin is to be found in the natural feeling, shared by judges, that a person should not be made the victim of what Mr. Justice Holmes called in speaking of evidence obtained by wire tapping by an officer, 'dirty business'....Moved by this detestation, and in a lesser degree, by sympathy for the 'unwary' 'innocent' defendant, the courts have groped for some legal principle on which to render nugatory the acts of the officer or to excuse the entrapped defendant.

This thesis will undertake to examine the various methods by which the courts have attempted to respond to the objectives of a doctrine of entrapment and the appropriateness of these techniques within the Canadian criminal justice system.

STATUTORY INTERPRETATION

The primary theoretical foundation upon which the United States Supreme Court has established the doctrine of entrapment is found in the majority judgement in Sorrells v. United States.[61] Chief Justice Hughes, in delivering the judgement of the court, expressed his difficulty with the application of the strict letter of a statute in circumstances involving instigation of criminal offences by law enforcement officials or their agents amounting to entrapment. He was

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59. Glanville Williams, Criminal Law, (1961) at 785
60. William E. Mikell "The Doctrine of Entrapment in the Federal Courts: 90 U. of Pa. L. Rev. 245 at 263
61. Supra, n. 1 at 446

of the opinion that to apply a statute literally under such circumstances was both foreign to its purpose and shocking to one's sense of justice and, consequently, it is the duty of the court to halt the prosecution in order to protect the government from the illegal conduct of its own law enforcement officers and to preserve the purity of the court.

The literal interpretation of a statute at the expense of the reason of the law has been condemned where it produces absurd consequences or flagrant injustice and, therefore, "the reason of the law in such cases should prevail over the letter."[62] Chief Justice Hughes further indicated that this established principle of statutory construction was applicable to the instant case. He was unable to conclude that Congress had enacted the statute with the intention that its processes of detection and enforcement should be abused by government instigated violation of the prohibitions contained therein by "otherwise innocent" individuals. He concluded by stating as follows:[63]

> If the requirements of the highest public policy in the maintenance of the integrity of administration would preclude the enforcement of the statute in such circumstances as are present here, the same considerations justify the conclusion that the case lies outside the purview of the Act and its general words should not be construed to demand a proceeding at once inconsistent with that policy and abhorrent to the sense of justice. This view does not derrogate from the authority of the court to deal appropriately with abuse of its processes and it obviates the objection to the exercise by the court of a dispensing power in forbidding the prosecution of one who is charged with conduct assumed to fall within the statute.

He further indicated that when interpreting a statutory prohibition it is essential to determine whether, in light of a clear public policy and the proper administration of justice, the conduct induced by the law enforcement official in the manner indicated would be deemed to fall within that prohibition.[64]

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[62] Ibid., at 446-7
[63] Ibid., at 448-9

In rejecting the majority judgement in Sorrells v. United States, Mr. Justice Roberts, in a separate dissenting opinion, referred to the statutory interpretation basis for the doctrine as a "strained and unwarranted construction of the statute" by the addition of an element not contained within the legislation. He was further of the opinion that where an individual's conduct, although complying with the constituent elements of an offence as contained within the statute, was the direct result of inducement by a law enforcement official or his agent to become the instrument of a criminal purpose he falls within the letter of the law and is susceptible to its penalties. Entrapment is not a defence to him as "his act, coupled with his intent to do the act, brings him within the definition of the law; he has no rights or equities by reason of his entrapment."[65] Entrapment neither excuses him nor contradicts the fact of his contravention of the prohibition. Mr. Justice Roberts concluded his rejection of the statutory interpretation or legislative intent foundation for the doctrine of entrapment by stating as follows:[66]

> We cannot escape this conclusion by saying that where need arises the statute will be read as containing an implicit condition that it shall not apply in the case of entrapment. ...This amounts to saying that one who with full intent commits the act defined by law as an offence is nevertheless by virtue of the unspoken and implied mandate of the statute to be adjudged not guilty be reason of someone's else improper conduct. It is merely to adopt a form of words to justify action which ought to be based on the inherent right of the court not to be made the instrument of wrong.

In the subsequent leading decision of Sherman v. United States,[67]

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[64] Ibid., at 451
[65] Ibid., at 456
[66] Ibid., at 456
[67] Supra, n. 26 at 379, quoting Warren C.J. at 372

Mr. Justice Frankfurter, in a separate opinion concurring in the result, concluded that it was "sheer fiction" to suggest that an accused person was not subject to conviction in circumstances amounting to entrapment because of a perceived legislative intent. He based his opinion on the following statement by Chief Justice Warren, found in the majority judgement of the court, that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violation."

Mr. Justice Frankfurter further indicated that the only legislative intention which can reasonably be extracted from a statute is "the intention to make criminal precisely the conduct in which the defendant has engaged."[68] He indicated that the statute is directed towards defining and prohibiting the substantive offence and does not comment on permissible limits of official enforcement of the legislation. Upon the enactment of a statute it is to be fitted into and interpreted according to the relevant principles of law in an antecedent legal system and that to look to the statute for "guidance and policy not remotely within the contemplation of Congress at the time of its enactment is to distort analysis." The justification which underlies the doctrine of entrapment can be lost sight of in the "pursuit of a wholly fictitious Congressional intent."[69]

M. L. Friedland also concluded that the statutory interpretation or legislative intention approach appears artificial in such circumstances and, further, that we do not usually build the law of defences and excuses in such a manner.[70] However, such an interpretation is not unheard of within the Canadian criminal justice system as evidenced by the decision of the Supreme Court of Canada in the strict liability case of R. v. City of Sault Ste. Marie,[71] wherein the Court attributed such an intention to the Parliament.

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[68] Ibid., at 379
[69] *Ibid.*, at 381
[70] *Supra*, n. 12 at 18

N. L. A. Barlow suggested that the majority of the United States Supreme Court was invoking the ancient rule of equitable construction known as Heydon's rule[72] which serves as a guide to construction,[73]

> ...authorizing a court to examine the social policy behind a statute, though not at the expense of express words. Its most common use has been to resolve an inconsistency between two provisions, or an ambiguity in a single provision, in terms of what is declared to be the intent of the legislature.

It has been suggested that this concept of "public policy" is a "valid and appropriate legal source" from which the courts may prescribe a defence or rule of entrapment.[74] In developing this basis for statutory interpretation or construction Barlow attempted to differentiate between public policy, which is a "creature of judicial law-making," and "legislative policy," which he defined as the "spirit that inferentially accompanies the written text of a given statute."[75] He indicated that a statute or court-made rule "is not necessarily the law of the case if some requirement of justice of greater weight compels its disregard."[76] Further, that in such cases "public policy operates to fill some gap in the statute or written law."[77]

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[71] (1978) 40 C.C.C. 353 (S.C.C.)
[72] Heydon's Case (1584) 3 Co. 76
[73] Supra, n. 58 at 272
[74] Supra, n. 58 at 284
[75] Ibid., at 273
[76] Ibid., at 274, quoting from R. M. Dworkin "The Model of Rules" (1967) 35 U. of Chicago L. Rev. 14
[77] Ibid., at 275, quoting from W. S. M. Knight "Public Policy in English Law" (1922) 38 L.Q.R. 207

It has been suggested that as Congress seldom, if ever, considers the various aspects of detection when it enacts a prohibitory statute the United States Supreme Court is perhaps attempting to indicate,[78]

> ...that had Congress considered extreme encouragement practices it would have found conduct induced by such practices to be excluded from the criminal proscription.

However, the conclusion of this thesis is that the statutory construction or legislative intent foundation for entrapment is correct only in so far as it indicates that a statute is to be construed so as not to produce an absurd consequence or flagrant injustice. In those circumstances where there are two possible interpretations for a statute the applicable rule of statutory construction is indicated in Maxwell on the Interpretation of Statutes[79] as follows:

> 'An intention to produce an unreasonable result is not to be imputed to a statue if there is some other construction available.' Where to apply words literally would 'defeat the obvious intention of the legislation and produce a wholly unreasonable result' we must 'do some violence to the words' and so achieve that obvious intention and produce a rational construction.

The court is compelled to construe the statute so as to fairly reflect its object and no other, "and to read the section with a view to finding out what it means, and not with a view to extending it to something that was not intended."[80] However, where the language of the statute is unambiguous, the appropriate rule of statutory construction, which is also in accordance with the minority opinions expressed previously in Sorrells v. United States and Sherman v. United States, is a follows:[81]

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78. Supra, n. 54 at 882
79. P. Langan, ed., Maxwell on the Interpretation of Statutes, (12th ed. 1969) 199
80. Ibid., at 47
81. Ibid., at 205

> However difficult it may be to believe that Parliament ever really intended the consequences of a literal translation, we can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the consequences, and however strongly we may suspect that this was not the real intention of Parliament.

In conclusion, the statutory interpretation or legislative intention approach is inappropriate to the Canadian criminal justice system as a theoretical foundation for the doctrine of entrapment. The fictitious nature of the approach is obvious and, as Mr. Justice Roberts indicated, is a "strained and unwarranted construction of a statute" in attributing to the Parliament an intention which was not remotely within their contemplation having regard to the unambiguous nature of the provisions of the statute.

It is the duty of the courts to apply the law according to the clear and unambiguous language contained therein, not to defeat it by applying some perceived intention which the Parliament may have neither contemplated nor intended upon the enactment of the legislation.

CONSTITUENT ELEMENTS

It has been suggested that in the absence of a recognized defence of entrapment in Canada an alternate approach would consist of a finding by the courts that the degree of instigation or inducement by the law enforcement officials or their agents will prohibit according responsibility to the accused of all the requisite constituent elements of the offence alleged. In this approach the courts would be attempting to ascribe the activities of the accused to the law enforcement officials in order to negative either the actus reus or the mens rea.[82] The officials would be held to have satisfied one of the constituent elements of the offence thereby precluding its commission by the accused or, by consenting to the commission of the offence or some aspect of the offence, consequently negativing an essential constituent element. This proposed basis upon which to establish the doctrine of entrapment has been indicated in the following terms:[83]

> It is quite conceivable entrapment may negative one the essential elements of the offence as it did in O'Brien and Kotyszyn for mens rea and Lemieux for actus reus.
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> It is submitted that there can be found in the existing Canadian cases a legal basis for a defence of entrapment. If entrapment takes away one of the elements of the offence be it mens rea which is implanted in an erstwhile innocent accused by an agent provocateur, or actus reus which is made impossible by the activities of the police negativing the criminal attributes of the act, the accused will be acquitted. He will be acquitted and correctly so because he did not perpetrate the crime as alleged.

An examination of those decisions which, upon immediate perusal, appear to have adopted this approach is essential to determine whether such an application of accepted principles of law have occurred as indicated and, if so, the validity of such an approach within the Canadian criminal justice system.

Chief Justice Hughes, in Sorrells v. United States, indicated that the conclusion of the Circuit Court of Appeals was that the defence of entrapment can be maintained,[84]

> ...only where, as the result of inducement, the accused is placed in the attitude of having committed a crime which he did not intend to commit, or where, by reason of the consent implied by the inducement no crime has in fact been committed.

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[82] Robert K. Patterson "Towards a defence of Entrapment" (1979) 17 Osgoode Hall L. J. 261 at 268

[83] Supra, n. 57 at 330

[84] Supra, n. 1 at 442

He illustrated the first class of offences to which he was referring by reference to a charge alleging an offence of selling liquor to an Indian who was disguised so as to mislead the vendor as to his identity. With reference to the second class of offences, he indicated that there may be physical elements or conditions essential to the offence which are absent in the case of a trap, such as in a prosecution for burglary where it appears that by reason of the trap there was no actual breaking.[85] However, he concluded as follows:[86]

> ...these decisions applying accepted principles to particular offences...neither in reasoning nor in effect...prescribe limits for the doctrine of entrapment.

A similar view was expressed in the judgement of Lord Diplock in R. v. Sang wherein his Lordship indicated that the fact a crime was counselled or procured by a law enforcement official or his agent cannot affect the guilt of the principal offender as both the actus reus and the mens rea are present in the case.[87] Obviously his Lordship was indicating that the mere fact of inducement or instigation of an offence by a law enforcement official is not sufficient to negative the essential constituent elements of an offence.

The Quebec Court of King's Bench, Appeal Side, in R. v. Kotyszyn,[88] considered circumstances wherein the law enforcement official, suspecting an individual of being a professional abortionist, by means of a frequently employed stratagem had a police woman pose as a patient requiring an abortion and seek assistance from the accused. The accused was subsequently charged with attempting to conspire to commit an abortion. The Court, in confirming the lower court's dismissal of the charge, stated that there was no common design or desire for the commission of a shared offence and, consequently, there were not two persons participating in the preparation of the same offence as the police woman never intended to obtain an abortion.[89] Therefore, the offence was not made out as the constituent elements had not been established by the Crown. This is not an indication that the instigation of the offence by the law enforcement official negatived the elements of the offence, but rather that the constituent elements were negatived by the absence of a co-conspirator who was of the same mind as the accused in the intention to commit the offence of obtaining an abortion. Mr. Justice Bissonnette, in delivering the judgement of the court, stated as follows:[90]

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[85] Ibid., at 442
[86] Ibid., at 443
[87] Supra, n. 32 at 1226
[88] (1949) 95 C.C.C. 261, 8 O.R. 256 (Que. K.B., App. Side)

> If all the constituent elements of this offence are proved, I do not see why the crime of conspiracy would not be committed.

Clearly the fact of entrapment was irrelevant to the judgement which was based upon a proper interpretation of the relevant section of the Criminal Code defining the offence of conspiracy. The charge failed because the officer was not truly intending to commit the offence and therefore did not come within the section, not because of any instigation of inducement. A lack of intention to carry out the offence would result in the acquittal of the accused had the co-conspirator not been an *agent provocateur*. Such a situation occurred in the case of *R. v. O'Brien*[91] wherein the Supreme Court of Canada considered an appeal from the decision of the British Columbia Court of Appeal in which a new trial was ordered on a charge of conspiracy to kidnap. At trial one of the co-conspirators who had denounced the scheme to the authorities and was consequently an informer rather than an agent provocateur indicated that at the time of the alleged conspiracy he had no intention of going through with he plan but was "just fooling the the respondent, or hoaxing him."[92] The Court, in dismissing the appeal, held that there must be a common design to commit an illegal act and, additionally, there must be an intention to put the common design into effect.[93] In the absence of such an essential element the offence cannot be established. The absence of this essential constituent element is the result of the insincerity of the co-conspirator rather than any instigation, inducement, or other intervention by a law enforcement official or his agent. Had the intention to commit the offence existed in the minds of both conspirators the fact of one conspirator being a law enforcement official would have been irrelevant.

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[89] Ibid., at 263
[90] *Ibid.*, at 264
[91] [1954] S.C.R. 666, 19 C.R. 371, 110 C.C.C. 1, [1955] 2 D.L.R. 311 (S.C.C.)

The Supreme Court of Canada further considered an instance in Lemieux v. The Queen[94] involving an accused who had been convicted of breaking and entering a dwelling house. The law enforcement officials and an informer has set a scheme in motion whereby the accused and the informant were to break into the particular house. Prior to the alleged break and entry the key was obtained from the owner of the house in order to allow the police to gain entry and spring the trap on the accused. The Court, in allowing the appeal, stated that it was open to the jury to find that the owner of the dwelling house had placed the police in possession with authority to deal with it as they deemed necessary in the circumstances. Further, that the law enforcement officials consented, assisted, and urged the accused to break in to the house. The Court was of the opinion that a breaking and entry in such circumstances did not constitute an offence for, although mens rea had clearly been established, "the actus reus which in fact was committed was no crime at all."[95] One could not break into a house when the owner had given his authority to the law enforcement officials to deal with the house as was necessary and they in turn had consented to the actual breaking into the house. The Court concluded that the reason the conviction could not stand was that the jury had not been properly instructed on this vital issue of whether an offence had in fact been committed.[96]

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[92] Ibid., at 667

[93] Ibid., at 668

[94] [1967] S.C.R. 492, 2 C.R.N.S. 1, [1968] 1 C.C.C. 187, 63 D.L.R. (2d) 75 (S.C.C.)

It has been suggested that in applying the theoretical basis that entrapment negatives an essential constituent element of the offence to the decision of Lemieux v. The Queen the following proposition can be arrived at.[97]

> Lemieux in my estimation, stands for the proposition that if an accused commits the offence in law entrapment will not save him. If the defence is successful it will negative an essential element thereof and he will be acquitted. No judicial clemency is available. It the defence succeeds, the accused did not commit the offence; if it fails, he did, and there is no further usage of the defence after that determination. In

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95. Ibid., at 4
96. Ibid., at 4. See also R. v. Chandler (1913) 1 K.B. 125, wherein the accused who intended to commit shop breaking was supplied a key by the servant of the shop owner with his consent. It was held that the key was supplied for the purposed of detecting the criminal in the commission of an offence. See also R. v. Irwin (1967) 61 W.W.R. 103 (Alta. S.C., App. Div.) affg. 64 W.W.R. 441 (S.C.C.) wherein the Court ignored the entrapment issue and based their decision on lack of intent.
97. Supra, n. 57 at 331

> law in Lemieux D was relieved of the actus reus by the entrapment.

However, Mr. Justice Estey, in Amato v. The Queen, properly interpretated the decision of Lemieux v. The Queen as not being required to decide the issue of entrapment as the accused had not committed the alleged offence of breaking and entering "because by police arrangement the owner of the property had consented to the arrangement."[98] Had the police set an identical trap, absent the consent of the owner, the accused would have been convicted. Consent to the breaking and entry, rather than entrapment, negatived the actus reus.

Mr. Justice Judson, in Lemieux v. The Queen, further expressed his opinion of the effect of solicitation by the law enforcement official or his agent in the determination of the culpability of the accused as follows:[99]

> Had Lemieux in fact committed the offence for which he was charged, the circumstances that he had done the forbidden act at the solicitation of an agent provocateur would have been irrelevant to the question of his guilt or innocence.

These obiter dicta comments by Mr. Justice Judson, have in some instances been interpreted to imply that only in those circumstances where an accused commits a prohibited act at the solicitation of an agent provocateur, as opposed to the constant inveigling and persistent importuning described as the appropriate determinative consideration by Chief Justice Laskin in Kirzner v. The Queen, would it be irrelevant to the question of guilt or innocence. However, it has been suggested that such an interpretation is unlikely as the facts of Lemieux v. The Queen constitute a classic case of entrapment.[100]

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[98] Supra, n. 94 at 4

[99] Ibid., at p. 4

In Amato v. The Queen, Mr. Justice Ritchie, in delivering the judgement of the Court, stated, in obiter dicta, as follows:[101]

> The weight of authority is to the effect that in a case where the evidence discloses that the crime in question would not have been committed save for the "calculated inveigling or persistent importuning" of the police it may then be apparent that it was the creative activity of the police rather than the intention of the accused which gave rise to the crime being committed. In such event the essential element of mens rea would be absent and the accused's defence would be established.

He further indicated as follows:[102]

> ...It is only where police tactics are such as to leave no room for the formation of independent criminal intent by the accused that the question of entrapment can enter into the determination of his guilt of innocence.

It is difficult to appreciate the logic of how the fact that an intention to commit an offence was originally conceived by another who was a law enforcement official or his agent and not a co-conspirator or partner in crime as believed, would serve to negate the mens rea of the accused who had subsequently adopted the original intent as his own. The presence of persuasion, inducement, or instigation by someone other than a law enforcement official would not negative the accused's mens rea and it is illogical to assume that because the offence was originally conceived and instigated by a government official mens rea would be negated in the accused or that it should be attributed solely to the instigator. The guilty mind was present in the accused during the commission of the offence which is the relevant time for consideration.

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[100] Barnett M. Sneiderman "A Judicial Test for Entrapment: The Glimmerings of a Canadian Policy on Police-Instigated Crime" (1973-4) 16 C.L.Q. 81 at 84

[101] Supra, n. 2 at 497

[102] Ibid., at 499

The interpretation which should be given to these obiter dicta comments by Mr. Justice Ritchie is that in circumstances where the tactics of the law enforcement officials are such as to prevent the formation of a criminal intent, such as by misleading the accused as to the nature of the act, that the issue of entrapment enters into the determination of his guilt or innocence. If such an interpretation is afforded to these comments the implication is that the facts constituting entrapment are only relevant to the guilt or innocence of the accused in such instances where the accused, because of the surrounding circumstances and not as a result of the source of the origin of the intention, was unable to or did not form the necessary criminal intent.

In conclusion it is contended the authorities cited do not lend support to the proposition that the fact entrapment techniques were employed negatives an essential constituent element of the offence charged. The authorities indicate that the courts have based their decisions upon established and accepted principles of law and have either ignored the entrapment aspects or, as in Lemieux v. The Queen, have indicated that such factors were irrelevant to the determination of guilt or innocence. There is no indication in these cases to suggest that entrapment is capable of negativing an element of the offence. The facts which tend to negative a constituent element of the offence in a particular instance may also correspond to the facts which are argued on behalf of entrapment. However, the same facts, not involving law enforcement officials, would still negative the same constituent element. It is neither the presence of the law enforcement officials nor the laying of the trap which negatives the element but rather another factor, such as consent, which would be capable of defeating the charge in any instance.

Where an accused has intentionally committed all the essential constituent elements of an offence the presence of instigation by a law enforcement official sufficient to constitute entrapment cannot, in the absence of other relevant determinative factors, serve to negate one of the constituent elements. Such an interpretation based upon a proper application of legal principle renders this theoretical foundation inappropriate to the establishment of a defence of entrapment within the Canadian criminal justice system.

ABUSE OF THE PROCESS OF THE COURT

Mr. Justice Roberts, in Sorrells v. United States, indicated that the doctrine of entrapment rested upon the fundamental rule of public policy that the "protection of its own functions and the preservation of the purity of its own temple belongs only to the court." He suggested that a violation of the principles of justice may be dealt with at any stage of the proceedings in which the facts are brought to the attention of the court by a number of remedies resulting in either an acquittal or a stay of proceedings.[103]

Abuse of the processes of the court has been interpreted in the following manner:[104]

> It connotes that the process of the court must be used properly, honestly and in good faith, and must not be abused. It means that the court will not allow its function as a court of law to be misused, and it will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation.

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[103] Supra, n. 1 at 457

[104] I. H. Jacob "The Inherent Jurisdiction of the Court" [1970] Current Legal Problems 23 at 40-1

It has been suggested that the purpose of the doctrine of abuse of the process of the court is to devise a means to,[105]

> ...ensure and safeguard the integrity of the legal process. Unlike many other matters, it does not exist 'in order to safeguard the rights of the accused.' It exists in order to repulse the manipulations of any party who would seek to distort orderly lawful processes and employ them for purposes not contemplated or intended.

In the civil action of Metropolitan Bank v. Pooley[106] Lord Blackburn expressed his opinion of the inherent jurisdiction of the courts to govern and protect their own processes in the following terms:[107]

> ...the court had inherently in its power the right to see that its processes was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing - the court has a right to protect itself against such an abuse...it was done by the court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the court; and in a proper case they did stay the action...

Upon examining the issue of whether the English courts have an inherent jurisdiction to govern their processes and thereby refuse to lend themselves to abusive and unjust proceedings, Lord Devlin in Connelly v. Director of Public Prosecutions[108] raised the following questions:

> Are the courts to rely upon the executive to protect their processes from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.

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[105] Stanley Cohen "Abuse of Process: The Aftermath of Rourke" 39 C.R.N.S. 349 at 352

[106] (1885) 10 App. Cas. 210 at 221

[107] Ibid., at 221

[108] (1964) A.C. 1254, [1964] 2 All E.R. 401 (H.L.)

However, Lord Holmes expressed a contrary opinion which he stated in the following terms:[109]

> I cannot concede that there ought to be given to the judge a discretion, which in my opinion he has not hitherto been allowed, to interfere with anything which he personally thinks is unfair.

Having regard to the Canadian criminal justice system, Mr. Justice Jessup, in delivering the judgement of the Ontario Court of Appeal in R. v. Osborn,[110] considered the question of whether the Canadian courts possess an inherent discretionary power to prevent an abuse of their processes from oppressive or vexatious proceedings and concluded that he was unable to recognize any basis or principle to suggest that such a power could not "be invoked to abate oppression."[111] The allegedly oppressive behaviour with which the court was concerned was the multiplicity of charges successively initiated on the same facts.

The County Court of Ontario, in R. v. Shipley,[112] referring to the decision of the Ontario Court of Appeal in R. v. Osborn, held that in circumstances amounting to entrapment where it would be oppressive and an abuse of the court's process to permit the prosecution to continue an inferior court of criminal jurisdiction has the right to prevent the abuse of its processes and, consequently, ordered a stay of proceedings. Similarly, in R. v. Ormerod,[113] Mr. Justice Laskin, for the Ontario Court of Appeal, citing as his authority the previous decision of the same court in R. v. Osborn, stated the the court was not powerless to prevent an abuse of its process whether in the lodging of the prosecution or the establishment of the foundation for the prosecution.[114]

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[109] Ibid., at 432

[110] [1969] 1 O.R. 152, [1969] 4 C.C.C. 185, 1 D.L.R. (3d) 664 (Ont. C.A.)

[111] Ibid., at 189

[112] [1970] 2 O.R. 411, [1970] 3 C.C.C. 398 (Ont. Co. Crt.)

[113] [1969] 2 O.R. 250, 6 C.R.N.S. 37, [1969] 4 C.C.C. 3 (Ont. C.A.)

However, these decisions were rendered prior to that of the Supreme Court of Canada in Osborn v. The Queen[115] which allowed an appeal from the previous decision of the Ontario Court of Appeal. Although the Supreme Court was unanimous in deciding that the Ontario Court of Appeal erred in its decision there was a division of opinion as to the basis for this opinion. Three members of the Court suggested that the doctrine of abuse of process had no place in Canadian law as a device for controlling police or prosecutors. Upon reviewing the appropriate provisions of the Criminal Code[116] and examining the English decision of Connelly v. Director of Public Prosecutions Mr. Justice Pigeon, for the majority of the Court, concluded that it is considered neither unfair nor oppressive to have an accused undergo several trials on the same charge when his conviction is quashed. He based his opinion on the rationale that "it is not considered desirable that a criminal should escape punishment for a misdeed because an error was committed in the trial." He concluded by stating as follows:[117]

> It is basic to our jurisprudence that the duty of the court is to apply the law as it exists, not to enforce it or not in their discretion. As a general rule, legal remedies are available, in an absolute way ex debito jusitiae. Some are discretionary but this does not destroy the general rule. I can see no legal basis for holding that criminal remedies are subject to the rule that they are not to be refused whenever in its

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114. Ibid., at 11
115. (1970) 12 C.R.N.S. 1, 15 D.L.R. (3d) 85 (S.C.C.)
116. Section 592(2) of the Criminal Code
117. Supra, n. 115 at 190

discretion, a court considers the prosecution oppressive.

Three members of the Court[118] indicated that the question of whether the Court has jurisdiction to prevent an abuse of its processes did not fall to be decided as there was insufficient evidence to support the conclusion of oppression.[119] Chief Justice Fauteux agreed that the appeal should be allowed without expressing reasons[120] and, consequently, no clear majority view emerged as to whether a criminal court has an inherent jurisdiction to stay a criminal proceeding which it perceives as being oppressive or an abuse of its processes.

An opposing opinion to that of the Ontario Court of Appeal was expressed by Mr. Justice Bull on behalf of the British Columbia Court of Appeal in R. v. Chernecki.[121] In rejecting the contention that the law enforcement official's entrapment by an officer, unknown to the accused as such, constituted a general defence to a charge the court, parenthetically, indicated that it was not prepared to accept the validity of the comments in R. v. Ormerod and R. v. Osborn by the Ontario Court of Appeal. The court based its decision on the "strong contrary view expressed in the Supreme Court of Canada" regarding the Court's power with respect to abuses.

However, the British Columbia County Court in R. v. Burnsetal,[122] in a motion to quash an indictment on the basis of the inordinate delay being oppressive and unfair to the defence, held that they had an inherent jurisdiction to prevent an abuse of process in the

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118. Hall, Ritchie, and Spence J.J.
119. Ibid., at 194
120. Ibid., at 186
121. [1971] 5 W.W.R. 469, 16 C.R.N.S. 230, 4 C.C.C. (2d) 556 (B.C.C.A.)
122. (1975) 30 C.C.C. (2d) at 400 (B.C. Co. Crt.)

case of clearly established oppression by the Crown by ordering a dismissal or stay of proceedings.[123] The court, however, indicated it would be a rare case when the courts would infringe the traditional rights and perogatives of the Crown to proceed with a prosecution.[124]

The Nova Scotia Supreme Court, Appeal Division, in R. v. Bonnar[125] upon reviewing the authorities held that in circumstances where an accused who did not have a prior intention or predisposition to commit an offence with which he was charged but committed it as a result of calculated inveigling and persistent importuning as such constitutes an abuse of the court's process and the proceedings should be stayed or the accused discharged.

As was previously indicated, Mr. Justice Laskin in R. v. Ormerod suggested that entrapment has no statutory basis in Canadian law nor is it a defence at common law which would warrant its inclusion under section 7(3) of the Criminal Code. He further expressed the opinion at the time that the only theoretical basis for entrapment is to be found in the court's inherent jurisdiction to control its processes from abuse by a stay of proceedings.

However, in Kirzner v. The Queen, Chief Justice Laskin was of the opinion that if a defence of entrapment is to be recognized in the Canadian criminal justice system that it may conceivably gain acceptance through section 7(3) of the Criminal Code. He refused to either endorse the view of the Ontario Court of Appeal in the present case or the view expressed by the British Columbia Court of Appeal in R. v.

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[123] Ibid., at 400
[124] Ibid., at 402
[125] Supra, n. 5 at 192

Chernecki rejecting entrapment as a defence, but rather chose to leave the question of the existence of a defence of entrapment in Canadian law unresolved at that time. He based his lack of endorsement of the position of the appellate courts in part on the following view:[126]

> Indeed if that opinion is based on a static view of s. 7(3) of the Criminal Code I find it unacceptable. I do not think that s. 7(3) should be regarded as having frozen the power of the Courts to enlarge the content of the common law by way of recognizing new defences, as they may think proper according to circumstances that they consider may call for further control of prosecutorial behaviour or of judicial proceedings.

It has been suggested that Chief Justice Laskin would appear to be abandoning the position taken in R. v. Ormerod that abuse of process is the appropriate theoretical foundation upon which to establish the doctrine of entrapment in favour of introducing entrapment as a defence gaining entrance to the courts through section 7(3) of the Criminal Code.[127] The appropriateness of introducing the defence of entrapment as a common law defence pursuant to section 7(3) has been previously discussed.

The Supreme Court of Canada in Rourke v. The Queen[128] once again considered the issue of whether there exists in Canadian law a principle of abuse of process which a court may invoke to stay criminal proceedings against an accused. The abuse of process alleged involved a delay of approximately twenty months between the commission of the offence and the subsequent arrest of the accused during which time witnesses had relocated and could no longer be located and evidence had been destroyed. It was accepted that the location of the accused

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126. Supra, n. 7 at 496
127. Robert K. Patterson "Towards a Defence of Entrapment" (1979) 17 Osgoode Hall L.J. 261 at 273
128. [1978] 1 S.C.R. 1021 (S.C.C.)

was known to the law enforcement officials during this period.

Chief Justice Laskin, in Rourke v. The Queen, stated his opinion as follows:[129]

> If, as I think...there is merit in the principle that a criminal court, like a civil court, is entitled to protect its process from abuse, the question of discretion becomes a matter of discipline, keyed to particular situations which, as an outgrowth of case law, commend themselves as of a kind in which the principle may be raised.

He further indicated the scope of this discretionary power as follows:[130]

> Apart from the generality of support for the proposition that a criminal court may stay proceedings which are an abuse of process or oppressive or vexatious and that...the power may be invoked by every court having criminal jurisdiction...and that the power to prevent abuse of process is one of special application and its exercise cannot be a random one.

However, Mr. Justice Pigeon, in delivering the majority judgement of the Court, expressed a contrary opinion in the following terms:[131]

> I have to disagree with the view expressed by McIntyre J.A. that there could be factual situations giving to a trial judge a discretion to stay proceedings for delay. For the reasons I gave in The Queen v. Osborn, I cannot admit of any general discretionary power in courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive.

It has been suggested that, although there may not be a general power to stay proceedings for abuse of the process of the court, the Supreme court may still apply it to "specific exceptional situations such as entrapment."[132] Although the courts may extend this discretionary power to specific exceptional circumstances it is unlikely that it will be extended to authorize a stay of proceedings in those instances amounting to entrapment for the reasons which will be subsequently discussed.

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[129] Ibid., at 1038-9
[130] Ibid., at 1040
[131] Ibid., at 1043
[132] Supra, n. 12 at 20

Mr. Justice Pigeon further indicated that he accepted as the correct view the opinion expressed by Viscount Dilhorne in Director of Public Prosecutions v. Humphreys.[133] This view in part is as follows:

> A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The function of prosecutors and judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.

It would appear that the refusal by the Supreme Court of Canada to stay a proceeding for abuse of process of the court where the abuse or oppression alleged is in the investigatory stage prior to the preferring of the indictment would indicate that abuses committed at that stage do not fall within the parameters of the doctrine. As was indicated by the British Columbia Court of Appeal in R. v. Rourke[134] the reason that the doctrine of abuse of process is not applicable to such a situation is as follows:[135]

> ...because the extraordinary power to intervene and stay proceedings only arises where the oppression or injustice occurs in the nature or manner in which the proceedings have been conducted.

Circumstances constituting entrapment fall within the investigatory stage and therefore outside the ambit of the doctrine of abuse of the process of the court. It has been suggested the Mr. Justice Pigeon was reiterating the recurring theme expostulated in R. v. Osborn that "where a prosecution is properly instituted it is not to be halted merely

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133. [1976] 2 All E.R. 497 at 511
134. [1975] 6 W.W.R. 591, 25 C.C.C. (2d) 555 at 567, 62 D.L.R. (3d) 650 (B.C.C.A.)
135. Ibid., at 567

because the prosecution is considered 'regrettable or 'unfair',"[136] and concluded as follows:

> It is therefore submitted that Pigeon, J., is denying the existence of a broad jurisdiction to stay proceedings but is affirming the existence of a very narrow discretion. The trial judge is not to assume the function of the prosecution by determining which prosecutions are launched.[137]

It has further been suggested that should the issue of the applicability of the doctrine of abuse of process to the defence of entrapment arise again that the result would probably be in conformity with the philosophy of the majority judgement of the Supreme Court of Canada in R. v. Wray,[138]

> ...that the judiciary has no role in the absence of express legislative sanction, in the control of police behaviour, other than through the medium of the law of torts, with its possibilities for punitive damages in cases of police excesses, and perhaps, through the medium of convicting policemen in the ordinary way if they commit criminal offences in the course of their police work.[139]

In Amato v. The Queen, Mr. Justice Estey, in the dissenting opinion, considered whether or not, following the judgements of the Supreme Court of Canada in Osborn v. The Queen and Rourke v. The Queen, there exists any jurisdiction in a Canadian criminal court to stay a prosecution on the grounds of abuse of process whether or not the alleged abuse takes the form of the defence of entrapment.[140] He interpreted the decision in Osborn v. The Queen to have been confined to the very narrow issue of whether the prosecution was oppressive in laying a multiplicity of charges successively in relation to the same facts, and not being decisive of the issue of abuse of process.[141] He further indicated that it is difficult to perceive of Osborn v. The Queen as "establishing anything more than that the doctrine of abuse of prosecution will not avail an accused in a case of multiple charges brought on the same set of facts."[142] Similarly, he interpreted Rourke v. The Queen as being narrowly confined to the issue of the effects of a delay in bringing to trial an accused some twenty months following the commission of the alleged offence.[143] He concluded as follows:[144]

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[136] John A. Olah "The Doctrine of Abuse of Process: Alive and Well in Canada" 1 C.R. (3d) at 358

[137] Ibid., at 358

[138] [1971] S.C.R. 272 (S.C.C.)

[139] Supra, n. 53 at 187

[140] Supra, n. 2 at 526

> I come therefore to the conclusion that the decisions of Osborn and Rourke must be taken as standing on their own facts and limited precisely to the ratio of the judgements disposing of the issues arising on those facts. It follows therefore that the observations of Jessup J.A. in Osborn with reference to the origins and breadth of the trial court discretion to protect the processes of the courts from abuse remain substantially unimpaired by succeeding decisions in this Court. Viewed from another perspective the majority in Rourke affirms an exceptional jurisdiction to stay proceedings...

The decisions of Osborn v. The Queen and Rourke v. The Queen, afforded their widest possible interpretation, have abolished the doctrine of abuse of process in Canada except in the most extraordinary or exceptional circumstances. Given the narrowest interpretation, as indicated by the comments of Mr. Justice Estey in Amato v. The Queen, the decisions eliminate the doctrine of abuse of process from situations wherein an multiplicity of charges are laid successively on the same facts or where there is undue delay in the laying of an information. Having decided that the doctrine of abuse of process is inapplicable to the previously mentioned circumstances it would appear highly unlikely that the court would extend the doctrine to include situations capable of constituting entrapment involving alleged abuses or oppression in the investigatory stage. As M. L. Friedland indicated:[145]

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[141] Ibid., at 526
[142] Ibid., at 528
[143] Ibid., at 529-30
[144] Ibid., at 530-1

> The case for interference with abusive prosecutorial practice is a far stronger one because it relates directly to the procedure before the court.
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> But even if the courts do step in to bar prosecutorial harassment they may not take the further and more difficult step of attempting to control police misconduct through a general discretionary power to bar prosecutions as an abuse of process. Indeed, if the concept, which is often given the convenient label of 'abuse of process' is given the fuller description of 'abuse of the process of the court' then it is not easy to extend it to the pre-trial stage.

It is concluded that the doctrine of abuse of the process of the court, if it is available in Canada following the decisions of the Supreme Court of Canada in Osborn v. The Queen and Rourke v. The Queen, is limited to extraordinary and exceptional circumstances which would not necessarily include all instances which constitute entrapment and, further, that such a doctrine would be limited to controlling the process of the courts from abusive or oppressive practices and should not be extended to pre-trial or investigatory procedures as a means of controlling the misconduct of law enforcement officials. Therefore, it is concluded that the doctrine of abuse of process of the courts is an inappropriate theoretical foundation upon which to establish the doctrine of entrapment within the Canadian criminal justice system.

SECTION 7 OF THE CHARTER OF RIGHTS

A possible viable alternative to the inappropriate theoretical foundations mentioned above is section 7 of the new Canadian Charter of Rights[146] which provides as follows:

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[145] Supra, n. 12 at 20

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The suitability of this section as an alternative basis for establishing a doctrine of entrapment will depend primarily upon the court's interpretation of the term "fundamental justice," which replaced "due process of law" in section 1(a) of the Canadian Bill of Rights. Some indication of whether the Canadian courts will interpret "fundamental justice" as procedural fairness or as substantive due process may be found in previous decisions related to the Bill of Rights or to American decisions with this issue.

In United States v. Russel[147] the Ninth Circuit Court reversed a conviction on the basis that the activity of the law enforcement officers in providing an essential ingredient in the manufacture of amphetamines constituted "an intolerable degree of governmental participation in the criminal enterprise."[148] The Supreme Court, in reversing the decision, indicated that entrapment was "not intended to give the federal judiciary a 'chancellor's foot' veto over the law enforcement practises of which it did not prove."[149] However, the Court further indicated that where an accused was predisposed to commit the offence instigated by the law enforcement officials he may be acquitted if,[150]

> ...the conduct of the law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction.

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[146] Constitution Act, 1982, Schedule B, Part 1
[147] 459 F. 2d 671 (1972)
[148] Ibid., at 673
[149] Supra, n. 24 at 435
[150] Ibid., at 431-2

The Court held that the defence of entrapment does not serve the same purpose as the exclusionary rule as the government's conduct violated no independent constitutional right of the accused.

In the subsequent decision of Hampton v. United States,[151] Mr. Justice Rehnquist, for the United States Supreme Court, stated that the government's involvement was obviously more significant than in United States v. Russell. However, in response to the defendant's position that the conduct of the law enforcement officials violated the principles of due process, the Court indicated as follows:[152]

> The limitations of the Due process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the defendant. Here, as we have noted, the police, the Government informant, and the defendant acted in concert with one another. If the result of the government activity is to 'implant in the mind of an innocent person the disposition to commit the alleged offence and induce its commission...' the defendant is protected by the defence of entrapment. If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law.

One possible interpretation of the term "fundamental justice" is that it should be equated with the principles of natural justice. In support of this proposition reference is made to de Smith's Judicial Review of Administrative Action[153] wherein it was indicated as follows:

> In English law the rules of natural justice perform a function, within a limited field, similar to the concept of procedural due process as it exists in the United States, a concept in which they lie embedded. The rules are not 'ex necessitate those of Courts of Justice'...but rather 'those desiderata which...we regard as essential, in contradistinction from the many

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[151] 425 U.S. 482 (1976)
[152] Ibid., at 485
[153] de Smith's Judicial Review of Administrative Action (4th ed. 1980) 156

> precautions, helpful to justice, but not indispensable to it, which by their rules of evidence and procedure, our courts have been obligatory in actual trials before themselves....' English law recognizes two principles of natural justice; that an ajudicator be disinterested and unbiased...and that the parties be given adequate notice and opportunity to be heard. There is no accepted standard of substantive natural justice to which justice must conform, though in one case a requirement that a statutory tribunal base its decision on evidence having some probative value was said to be a principle of natural justice. On the other hand, the related duty of fairness, increasingly relied upon by the courts as a criterion of procedural regularity, may emerge as a fertile source of substantive standards with which decision makers must comply.

The decision of the Privy Council in Ong Ah Chaun v. Public Prosecutor; Kah Chaie Cheng v. Public Prosecutor,[154] an appeal from the Court of Criminal Appeal of Singapore, might be considered persuasive authority in support of this proposition. Certain statements of Lord Diplock appear to support the proposition that the principles of fundamental justice are limited to procedural matters.

In Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288,[155] the British Columbia Court of Appeal, per curiam, dealt with the contention that the principles of fundamental justice referred to in section 7 of the Charter of Rights refers to matters of procedure only, on the basis of the above reasoning, in the following manner:

> Upon this view of the matter s. 7 is to enshrine in the constitution the principles of natural justice. This is certainly one view of the matter. It does not, however, give any effect to s. 52 of the Constitution Act, which can be viewed as effecting a fundamental change in the role of the courts. The Bill of Rights allowed the courts to test the content of federal legislation, but because the Bill was merely a statute, its effectiveness was hampered by the equally persuasive 'presumption of validity' of federal legislation.

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[154] [1981] A.C. 648 at 670-1 (P.C.)
[155] [1983] 3 W.W.R. 756 (B.C.C.A.)

> The Constitution Act, in our opinion, has added a new dimension to the role of the courts; the courts have been given constitutional jurisdiction to look at not only the vires of the legislation and whether the procedural safeguards required by natural justice are present, but to go further and consider the content of the legislation.[156]

In the Supreme Court of Canada decision of Curr v. The Queen,[157] Mr. Justice Laskin interpreted "due process of law" as follows:

> The phrase 'due process of law' has its context in the words of s. 1(a) that precede it. In the present case, the connection stressed was with 'the right of the individual to...security of the person.' It is obvious that we read 'due process of law' as meaning simply that there must be some legal authority to qualify or impair security of the person would be to see it as declaratory only. On this view, it should not matter whether the legal authority is found in enacted law or in unenacted or decisional law. Counsel for the appellant does not, of course, stop here. He contended for a qualitative test of legislation to meet the standard of due process of law and urged that the Court find that s. 221 fell below it. This was, however, a bare submission, not reinforced by any proposed yardstick.

Having provided the above interpretation of "due process," Mr. Justice Laskin alluded to those considerations relating to fundamental justice mentioned in Curr v. The Queen, as follows:

> In so far as s. 223 may be regarded, in the light of s. 223(2), as having specific substantive effect in itself, I am likewise of the opinion that s. 1(a) of the Canadian Bill of Rights does not make it inoperative. Assuming that 'except by due process of law' provides a means of controlling substantive federal legislation - a point that did not directly arise in R. v. Drybones...- compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the British North American Act.

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156. Ibid., at 759
157. [1972] 7 C.C.C. (2d) 181 at 190 (S.C.C.)

> Those reasons must relate to objective and manageable standards by which a Court should be guided if scope is to found in s. 1(a) due process to silence otherwise competent federal legislation. Neither reasons nor underlying standards were offered here. For myself, I am not prepared in this case to surmise what they might be.[158]

The "principle of fundamental justice" has been interpreted by the Supreme Court of Canada in R. v. Duke,[159] in the judgement of Mr. Justice Fauteaux, as follows:

> Under s. 2(e) of the Bill of Rights no law of Canada shall be construed or applied so as to deprive him of 'a fair hearing in accordance with the principles of fundamental justice.' Without attempting to formulate any final definition of these words, I would take them to mean, generally, that the tribunal which ajudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give him the opportunity adequately to state his case.

M. L. Friedland contended that "of all the legal rights in the Charter section 7 provides the greatest scope for challenging legislative and government action."[160] In reference to the term "fundamental justice" he raised the issue of whether it is limited to procedural justice and concluded as follows:[161]

> No doubt the drafters of the Charter thought so, but there are no specific words to this effect in the Charter. 'Due Process' in the United States has been used to encompass so-called substantive as well as procedural due process, although many disagree with this approach.

He contended that one must be cautious in applying cases under the Bill of Rights where the term "fundamental justice" is interpreted according to its relation with the "fair hearing" referred to in section 2(e) of the Bill of Rights, and concluded as follows:

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[158] Ibid., at 191

[159] [1972] 7 C.C.C. (2d) 474 at 478, [1972] S.C.R. 889 (S.C.C.)

[160] M. L. Friedland "Legal Rights Under the Charter" (1982) 24 C.L.Q. 430 at 431

[161] Ibid., at 432-3

> Similarly, it should be possible, for example, to solve abuses in the area of entrapment without turning entrapment into a constitutional issue. The Charter will be useful, though, in giving a push to the development of ordinary criminal law doctrines, and for this purpose will undoubtedly be widely cited by counsel and the courts.[162]

Chief Justice Laskin expressed the following view, in the dissenting opinion, in Morgentaler v. The Queen:[163]

> This Court indicated in the Curr case how foreign to our constitutional traditions, to our constitutional law and to our concepts of judicial review was any interference by a court with the substantive content of legislation. No doubt, substantive content had to be measured on an issue of ultra vires even prior to the enactment of the Canadian Bill of Rights, and necessary interpretative considerations also had and have a bearing on substantive terms. Of course, the Canadian Bill of Rights introduced a new dimension in respect of the operation and application of federal law, as the judgements of this Court have attested. Yet it cannot be forgotten that it is a statutory instrument, illustrative of Parliament's primacy within the limits of its assigned legislative authority, and this is a relevant consideration in determining how far the language of the Canadian Bill of Rights, should be taken in assessing the quality of federal enactments which are challenged under s. 1(a). There is as much a temptation here as there is on the question of ultra vires to consider the wisdom of the legislation, and I think it is our duty to resist it in the former connection as in the latter.[164]

However, having taken this position, the Chief Justice appeared to have left open the possibility, in his dissenting opinion, that the Court will give effect to the substantive approach when, in dealing with the provisions of the Canadian Bill of Rights, he concluded in Morgentaler v. The Queen as follows:[165]

> I am not, however, prepared to say, in this early period of the elaboration of the impact of the Canadian Bill of Rights upon federal legislation, that the prescriptions of s. 1(a) must

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[162] Ibid., at 436

[163] [1976] 1 S.C.R. 616, 30 C.R.N.S. 209, 20 C.C.C. (2d) 449, 53 D.L.R. (3d) 161, 4 N.R. 277 (S.C.C.)

[164] Ibid., at 632-3

[165] Ibid., at 633

> be rigidly confined to procedural matters. There is often an interaction of means and ends, and it may be that there can be no proper invocation of due process of law in respect of federal legislation as properly abridging a person's right to life, liberty, security and enjoyment of property. Such a reservation is not, however, called for in the present case.

In Rourke v. The Queen, the trial judge had indicated that to refuse a stay of proceedings in the circumstances of the case would "be to deny the accused his right to a fair hearing in accordance to the principles of fundamental justice." On appeal to the Supreme Court of Canada, Chief Justice Laskin's only comment was that he was unable to appreciate the application of section 2(c) of the Canadian Bill of Rights to the issue of abuse of process as it arose on the facts of the case and proposed to deal with the issue as one not dependant upon the Bill of Rights.[166]

As was previously indicated, the British Columbia Court of Appeal in Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288 held that the principles of fundamental justice as guaranteed by section 7 of the Charter of Rights are not equivalent to natural justice. Rather, the Charter of Rights was held to have given the courts the authority not only to determine whether the procedural safeguards required by natural justice are present but, further, that the principles of fundamental justice extend beyond matters of procedure to the substantive law.

However, the Ontario Court of Appeal in Re Potma and The Queen[167] held that the concept of fundamental justice and a fair hearing relevant to the case were fully canvassed in Duke v. The

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166. Supra, n. 128 at 1024
167. (1983) 41 O.R. (2d) 43 at 50 (Ont. C.A.)

Queen and were the same whether considered under the Charter of Rights or the Bill of Rights.

One additional issue which may arise is whether the right to liberty under section 7 of the Charter of Rights guarantees the right or freedom to be free from surveillance by law enforcement officials. This issue was dealt with most eloquently by one author as follows:[168]

> Next in importance to personal freedom is immunity from suspicious and jealous observation. Men may be without restraints upon their liberty; they may pass to and fro at pleasure; but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators, - who shall say that they are free? Nothing is more revolting to Englishmen then the espionage which forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gaiety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency. Rulers who distrust their own people must govern in a spirit of absolutism; and suspected subjects will be ever sensible of their bondage.

It has been suggested that such a right does not exist in the United States when there exists reasonable grounds for believing that the law is being violated or is about to be violated.[169] However, in Russo v. Miller,[170] the court expressed the following opinion:[171]

> ...unlawful trespasses are continually committed under the guise of law enforcement, or that no claim is made that the law has ever been violated on the premises, or that there is nothing more than mere suggestion of a suspicion that the law is being violated, and if, in either event, it is made to appear that the illegal acts of the police officers will result in irreparable damage to the property right of the complainant, if an injunction is not issued, then injunctive relief may be available to the injured party coming into court with clean hands...

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168. Thomas May, Constitutional History of England (1863) 275
169. Richard C. Donnelly "Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs" (1951) 60 Yale L.J. 1091 at 1096
170. 221 Mo. App. 292, 3 S.W. 2d 266 (1928)
171. Ibid., at 268

It is concluded that section 7 of the Charter of Rights is an inappropriate theoretical foundation upon which to establish a doctrine of entrapment. The "principle of fundamental justice" has been properly interpreted by the majority decision of the Supreme Court of Canada in Duke v. The Queen in a manner which equates it with a "fair hearing" or the principles of "natural justice" which would have the effect of limiting it to procedural law. It would be fair to conclude that the drafters of the Charter of Rights were aware of the law as it existed in Canada prior to the enactment of the Charter of Rights and that section 7 was enacted with the intention of giving the term "principles of fundamental justice" the meaning expressed by the Supreme Court of Canada.

The right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice is neither abridged nor offended by the conviction of an individual who has committed a criminal offence as a result of the instigation or inducement of a law enforcement official. His rights under section 7 would only be violated if, having been charged with the offence, he was not granted a fair hearing and an opportunity to make full answer and defence.

CHAPTER FOUR

TEST FOR DETERMINING OR ESTABLISHING ENTRAPMENT

SUBJECTIVE - CREATIVE ACTIVITY TEST

Chief Justice Hughes, in delivering the judgement of the court in Sorrells v. United States suggested that the appropriate test or approach in the determination of the existence of entrapment is to establish the predisposition and criminal design of the accused as this test is relevant to the question of whether the accused was a person, otherwise innocent, induced by the government to commit an offence which was the product of the creative activity of its own officials. He contended that the defence is not available to permit a guilty person to go free but rather that the government cannot contend that the accused is guilty in circumstances where the law enforcement officials are the instigators of the offence.[172]

This view was subsequently endorsed by the majority of the court in Sherman v. United States in which Chief Justice Warren, in delivering the judgement of the court, indicated that the factual issue before the court in the determination of entrapment is whether the accused is an otherwise unwilling individual persuaded by a law enforcement official to commit the offence charged or whether he had a predisposition or proclivity to commit the offence and only exhibited the natural hesitancy of one about to embark on a criminal activity.[173]

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172. Supra, n. 1 at 452
173. Supra, n. 26 at 371

According to this approach entrapment occurs when the criminal activity is the product of the creative activity of the law enforcement officials. An attempt is made to differentiate between a "trap for the unwary innocent and the trap for the unwary criminal"[174] based on a determination of the predisposition of the accused to commit the offence. In the application of such a test, the accused will examine the conduct of the law enforcement officials and in return will be subjected to an inquiry into his own conduct, predisposition, or criminal propensity as relevant to his claim of innocence.[175]

This subjective or creative activity approach to the determination of the existence of entrapment is predicated on an unexpressed and implied intent of Congress to exclude from criminal liability for prosecution individuals who are "otherwise innocent" but lured to the commission of the offence by law enforcement officials or their agents. The focus of the test is on the predisposition and criminal propensities of the particular accused. An "otherwise innocent" person induced to commit an offence by a law enforcement official may avail himself of the defence whereas an individual predisposed to commit the offence charged or with whom the criminal design originated can not claim to have been entrapped, notwithstanding government intervention and instigation.

Predisposition may be established by the willingness with which the accused complied with the request in light of the inducement, his familiarity with the criminal enterprise, possession of the necessary tools of the trade, or statements made by the accused at the time of the inducement.[176] In Sherman v. United States, Mr. Justice Frankfurter, in commenting upon the subjective test, indicated that this general intention or predisposition to commit the offence may be established by admitting evidence to show the defendant's reputation, criminal activities, and previous record.[177]

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[174] Ibid., at 372
[175] Ibid., at 373

In Whittier v. United States, the court held that the prosecution may introduce evidence of former convictions to establish the accused's predisposition provided "they are of a sufficiently similar character as to support an inference that the defendant had the requisite general intention."[178]

Predisposition may be established by means other than evidence of a previous criminal record of related convictions, as was indicated in People v. Gonzales,[179] as follows:

> Although the defendant had no prior criminal record, this factor alone cannot overcome evidence of his ability and instant willingness to make the unlawful sale as soon as the opportunity to do so was presented.

Predisposition is established when it is determined that the accused was ready and willing to commit the particular type of offence charged when presented with an opportunity. Park indicated as follows:[180]

> Personal weakness (such as a proclivity for drug use) that made him more susceptible to temptation then the average person do not constitute predisposition unless the defendant's self control was so slight that he was ready and willing to commit the crime at any favourable opportunity.

Mr. Justice Roberts, in delivering a strong minority opinion in

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[176] Frank L. Michelman and Antonin Scalia "Entrapment" (1959-60) 73 Harv. L. Rev. (Pt. 2) 1333 at 1339

[177] Supra, n. 1 at 382

[178] Supra, n. 20 at 596

[179] 25 Ill. 2d 235 at 238, 184 N.C. 2d 833 at 834 (1962)

[180] Roger Park "The Entrapment Controversy" (1976) 60 Minn. L. Rev. 163

Sorrells v. United States, rejected the subjective approach and expressed the rationale for his opinion as follows:[181]

> To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction. It is to discard the basis of the doctrine and in effect to weigh the equities as between the government and the defendant when there are in truth no equities belonging to the other, and when the rule of action cannot rest on any estimate of the good which may come of the conviction of the offender by foul means. The accepted procedure, in effect, pivots conviction in such cases, not on the commission of the crime charged, but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment.

Mr. Justice Frankfurter, in the minority opinion of Sherman v. United States, recognized these dangers and objected to the subjective test for the following reasons:[182]

> Permissible police action does not vary according to the particular defendant concerned; similarly if two suspects have been selected at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition.

Mr. Justice Frankfurter also expressed the opinion that an approach which focuses upon an examination of the character and disposition of the accused person rather than directing its attention to the conduct of the law enforcement official loses sight of the underlying reasons for the defence of entrapment.[183]

In United States v. Russell,[184] Mr. Justice Rehnquist, in delivering the majority judgement of the court, reaffirmed that the defence of entrapment was not established upon any judicial authority to dismiss prosecutions but rather upon the notion that Congress could not

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181. Supra, n. 1 at 459
182. Supra, n. 26 at 383
183. Ibid., at 383
184. 411 U.S. 423

have intended criminal prosecution of an accused who has committed all the constituent elements of an offence, but was instigated to commit the offence by a law enforcement official.[185]

In the dissenting opinion, Mr. Justice Stewart contended that where the subjective approach is predicated upon an unexpressed and implied intent of Congress to exclude from its statutes the criminal prosecution of accused persons, "otherwise innocent, who have committed the offence at the instigation of the law enforcement official," that the "key phrase" is "otherwise innocent,"[186] and concluded as follows:[187]

> ...to say that such a defendant is 'otherwise innocent' or not 'predisposed' to commit the crime is misleading, at best. The very fact that he has committed an act that Congress has determined to be illegal demonstrates conclusively that he is not innocent of the offence. He may not have originated the precise plan or the precise details, but he was 'predisposed' in the sense that he has proved to be quite capable of committing the crime. That he was induced, provoked, or tempted to do so by the government agents does not make him any more innocent or any less predisposed than he would be if he had been induced, provoked, or tempted by a private person - which, of course, would not entitle him to cry 'entrapment'.

He concluded that as the only difference between these two situations is the identity of the instigator it follows that the "significant focus" must be directed towards conduct of the law enforcement officials and not to the predisposition or propensities of the accused. The logic of this interpretation is sound as the majority indicated that the criminal statutes were never intended to apply to otherwise innocent individuals whose offensive conduct was instigated by the government. Emphasis is not on the instigation of an otherwise innocent individual but rather upon instigation of an individual by the law enforcement officials or their agents. It would therefore appear appropriate that the emphasis of a doctrine of entrapment be placed upon the conduct of the government agent.

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[185] Ibid., at 435
[186] Ibid., at 440
[187] Ibid., at 442

Lord Scarman, in R. v. Sang, expressed his rejection of the existence of a defence of entrapment as follows:[188]

> Incitement is no defence in law for the person incited to crime, even though the incitor is himself guilty of crime and may be far the more culpable. It would confuse the law and create unjust distinctions if incitement by a policeman or official exculpated him when they incited to crime whereas incitement by others, perhaps exercising much greater influence, did not.

Park attempted to respond to the argument that it is illogical to suggest that a defence of entrapment is concerned with protection of "innocent" persons as it treats differently persons incited to commit an offence and therefore of equal culpability and, consequently, is not concerned with culpability, by suggesting that a rule intended to excuse non-culpable persons must be limited in scope to prevent contrived defences. If entrapment by private persons were permitted as a defence there would be a serious danger of collusion. Further, that the exception to private persons inducing the offence can be justified on the basis that the defence has more than one concern or objective, such as maintaining the purity of the court or controlling police conduct.[189] However, the rationale of the subjective approach of the United States federal courts is that the law was never meant to apply to these latter situations and it would appear unlikely that the test can be extended beyond that issue when dealing with culpability.

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[188] Supra, n. 32 at 1243
[189] Supra, n. 180 at 241-2

Park attempted to define "innocent" as not involving a denial of guilt from engaging in the prohibited conduct for which they are charged but rather that they are "entitled to an acquittal because they might not have committed a crime of the nature charged had they not been tempted by the agent."[190]

It has further been suggested by Mr. Justice Stewart, in United States v. Russell, that the subjective test permits the introduction into evidence of hearsay, rumor, and suspicion in order to establish the defendant's predisposition to commit the offence which would be both unreliable and prejudicial to the accused[191] and, under ordinary rules of evidence, would be inadmissible. However, recognition of the subjective approach does not necessarily imply that evidence of reputation and hearsay are admissible as the predisposition of the accused may be established by other means such as statements made by the accused at the time of the commission of the offence, the previous criminal record of the accused and his willingness to participate in the criminal activity.[192]

Obviously an individual who claims to have been "otherwise innocent" and who committed a criminal offence only as the result of entrapment cannot reasonably be heard to complain of an "appropriate and searching inquiry into his own conduct and predisposition."[193] In Gorin v. United States,[194] the court responded to this objection to the subjective approach by stating that "if an accused asserts that he is a lamb who has been led astray he must be prepared to face evidence that he is a wolf on the prowl."

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[190] Ibid., at 244
[191] Supra, n. 24 at 443
[192] See People v. Benford, supra, n. 24 at 29, wherein the California Supreme Court accepted the subjective test but refused to admit evidence of reputation or hearsay.
[193] Supra, n. 24 at 443
[194] 313 Fed. 2d 641 (1963)

It has been suggested that the objection to the subjective approach that it admits evidence of reputation and hearsay is answered in part by Whittier v. United States which held that "any reputation evidence that tends to show predisposition must be admitted in accordance with the normal rules of evidence concerning reputation."[195]

In Hampton v. United States[196] the contention of the defence was that the conduct of the law enforcement officials was so outrageous as to violate principles of due process. Mr. Justice Rehnquist, in delivering the majority judgement of the court, reviewed the previous decisions which had ruled that the defence of entrapment focuses on the intent or predisposition of the accused to commit the crime and that entrapment could not be based on government misconduct where the predisposition of the accused to commit the crime had been established.[197] The court rejected the argument of defence as not being supported by the facts and concluded with a reaffirmation of the subjective standard.[198]

A strong dissenting opinion was voiced by Mr. Justice Brennan, wherein he expressed the view that the fact an accused is "predisposed" cannot possibly justify the conduct of the law enforcement officials in purposefully creating crime.[199] The minority of the court indicated in a concluding comment as follows:[200]

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[195] Joseph D. Cronin "The Law of Entrapment in Massachusetts and the First Circuit" (1980) 14 Suffolk U.L.R. 1203 at 1222

[196] 425 U.S. 484, 96 Sup. Crt. R. 1646 (1976)

[197] Ibid., at 1649

[198] Ibid., at 1650

[199] Ibid., at 1654, Stewart and Marshall JJ concurred in this dissenting opinion.

> No one would suggest that the police could round up and jail all 'predisposed' individuals, yet that is precisely what set-ups like the instant one are intended to accomplish.

Critics of the subjective test have indicated that although an accused is on trial for the current offence he is in effect being tried for previous offences in the examination of his previous criminal record and other evidence to establish a proclivity for crime.[201] It has been suggested that the subjective approach may lead to undesirable practices if an accused has a previous record as he may be subjected to persuasion, inducement or encouragement by law enforcement officials secure in the knowledge that the accused would have great difficulty in establishing the defence of entrapment.[202] The subjective test has been rejected for the following reason:[203]

> Thus the subjective test is inadequate as a control on police practice for two reasons; the test is difficult to understand and unworkable in situations where quick action is required; the test is conceptually a trial defence and not a limitation on police practice.

Further, it has been suggested that to permit law enforcement officials to employ persuasion and inducement against those individuals with a previous record militates against the "ameliorative hopes of

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200. Ibid., at 1654. See also Casey v. United States 276 U.S. 413 (1928) (Brandeis, J., dissenting) wherein it was observed that the prosecution should be stopped, not because a right of the accused had been denied, but rather to protect the government from illegal conduct of its officers and to preserve the purity of the courts and, consequently, predisposition was irrelevant as the question for determination is the permissible degree of government conduct.
201. Daniel L. Rotenberg "The Police Detection Practice of Encouragement" (1963) 49 Virginia L. Rev. 671 at 897
202. Ibid., at 898
203. Ibid., at 899

modern penology."[204] However, such an opinion fails to consider that a previous record in only one aspect of the evidence to establish a predisposition or propensity to commit the offence which is determinative of the issue of the availability of the defence.

Heydon indicated that the difficulty which he perceived with the subjective approach was that it "is wrong that the greatest temptation can legitimately be offered to those whose record shows them to be least able to resist."[205] However, it is those individuals who are proven to be least able to resist temptation and who, in all likelihood would be exposed to inducements from other sources, that should be the focus of these law enforcement procedures.

A limited number of Canadian courts have dealt with the issue of an appropriate test or approach by which to determine the existence of entrapment. In R. v. Sirois,[206] Mr. Justice Greshul, in a brief oral judgement for the Alberta Supreme Court, held that the evidence was insufficient to constitute entrapment. However, he added in obiter dicta, that, to the extent entrapment may be raised as a defence, there must be clear evidence that there was implanted in the accused's mind by the government agent the disposition to commit the offence in order to obtain a prosecution.[207] This would appear to indicate a preference for the subjective standard in the determination of entrapment.

The Ontario County Court, in R. v. Shipley,[208] held that the circumstances before the court were sufficient to constitute entrapment and ordered a stay of proceedings. They arrived at this conclusion on the basis that he accused was a naive, inexperienced individual who, "without the inducements held out by the officer" would not have indulged in the offence alleged. Once again the Canadian courts have appeared to endorse the subjective approach as a means of determining the existence of entrapment.

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[204] D. P. Bancroft "Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defence" 31 U. of Chicago Q. 137 at 171

[205] Supra, n. 11 at 284

[206] [1972] 2 W.W.R. 149 (Alta. S.C.)

[207] Ibid., at 151

[208] [1970] 2 O.R. 411, [1970] 3 C.C.C. 398 at 401 (Ont. Co. Ct.)

In Amato v. The Queen the majority of the Supreme Court of Canada held that the circumstances before the Court were not sufficient to constitute entrapment assuming it to exist within the Canadian criminal justice system, but without deciding the issue. Conversely, the view held by the minority of the Court was not only that the defence of entrapment is available to an accused person but that on the facts of the particular case the defence had been established. An examination of the facts of the case will prove instructional in determining the test or standard applied by the members of the Court in arriving at these opposing viewpoints.

The appellant had been charged and convicted on two counts alleging the offence of trafficking in cocaine. The circumstances surrounding the transaction forming the subject matter of the two counts indicate that a police informer, with a drug related criminal record, was employed by the police for the purpose of locating sources from which traffickers in narcotics were obtaining their supply. The informer received an introduction to the appellant, a hairdresser, and posing as one in need of drugs requested that the appellant obtain the narcotics for him. The appellant initially refused but following a series of telephone calls to his home and his place of employment he contacted an individual and obtained a gram of cocaine which he supplied to the informer. This first transaction formed no part of either charge against the appellant.

The informer subsequently made numerous phone calls and visits to the appellant directed towards soliciting further drugs. The appellant succumbed to the pressure and arranged to meet with the informer and an undercover police officer and following further persuasion again produced an amount of cocaine which he supplied to the officer and which formed the subject matter of the first charge.

The undercover officer, posing as one who had contacts in the United States drug trade and who were arriving the following day and were in immediate need of a supply of drugs which they were prepared to obtain by violence, induced the appellant to obtain a further supply of cocaine. The appellant and his supplier were subsequently charged accordingly.

All transactions were solicited initially by the informer and later by the undercover officer for the primary purpose of locating suppliers of narcotics and with the appellant playing an incidental but essential role in this objective. The appellant had not been previously known to the narcotics officers as an individual involved in any way with the illegal use of narcotics and was apparently selected as he had previously been the boyfriend of the girl who was eventually charged with offences arising out of the supplying of the narcotics.

Mr. Justice Dickson held that "on the facts of this case, the defence on entrapment, assuming it to be available under Canadian law, does not arise."[209] Mr. Justice Ritchie, in his concurring opinion, also held that on the facts the activity of the law enforcement official and his agent did not constitute entrapment. However, he did appear to accept the possible existence in Canadian law of defence of entrapment when he indicated that had the appellant been subjected to a threat of violence against his person if he failed to procure the required supply of drugs that might well have supported a defence of entrapment.[210] Although he failed to elaborate, it would appear upon reading this statement in conjunction with previous comments regarding Kirzner v. The Queen that he is suggesting that the threat of violence by a law enforcement official would negate the *mens rea*. This interpretation is supported when he defined the conditions under which he perceived the defence to be available as follows:[211]

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[209] Supra, n. 2 at 490

> In my opinion it is only where police tactics are such as to leave no room for the formation of independent criminal intent by the accused that the question of entrapment can enter into the determination of his guilt or innocence.

Obviously Mr. Justice Ritchie's acceptance of the possible existence of a defence of entrapment in Canadian law is founded upon an improper application of the principle of *mens rea*. If, as he suggested, the conduct of the law enforcement officials negated *mens rea* a defence of entrapment would be unnecessary in the particular circumstances. However, this approach is apparently placing emphasis on the conduct of the law enforcement officials rather than upon a determination of the predisposition of the accused to commit the offence alleged.

Perhaps the best indication of the direction in which the Canadian courts will proceed in establishing a standard for the determination of the existence of entrapment is found in the dissenting judgement of Mr.

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[210] Ibid., at 498
[211] *Ibid.*, at 499

Justice Estey, in Amato v. The Queen, wherein he concluded:[212]

> By itself and without more the predisposition in fact of the accused is not relevant to the availability of the defence. On the other hand, where the true purpose of the police initiative is to put the enforcement officers in a position to obtain evidence of an offence when committed, absent other circumstances already noted, the concept of entrapment does not arise.

It would appear that a compromise or composite test incorporating elements of both the subjective and objective approach was being considered as the most suitable method for determining the existence of entrapment. Such an approach would presumably be intended to consider all relevant factors while eliminating many of the more serious objections which exist with each of the independent tests.

It has been suggested that the subjective approach should be rejected as it is based upon a "misunderstanding of general principles of criminal liability" and will result in unequal treatment of accused persons, and further that,[213]

> ...no matter how persuasive the inducement, the defendant intended in the only sense the law requires to commit the particular crime for which he is charged.

A difficulty with the subjective or origin of intent formula is the assumption that "intent" can be isolated and assigned entirely to either the accused or the law enforcement official. It has been indicated as follows:[214]

> A factual analysis of the entrapment cases discloses that the allocation of 'intent' to the defendant or the officer actually depends upon whether the defendant was previously engaged in criminal activities of a similar character. If he was then the 'intent' is found to originate with him; it not, then it was generated by the officers. But it is not clear why this

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[212] Ibid., at 524

[213] Supra, n. 204 at 170

[214] Supra, n. 169 at 1108

> should be so even if prior violations are admissible in evidence. It is a strange doctrine that makes guilt or innocence depend upon whether a defendant has committed other similar offences.

The fact that an individual other than the accused originated the intention does not negate such intention in the mind of the accused if he adopted the intention to commit the offence as his own and acted upon it accordingly. Although the intent to commit an offence may well have been conceived by the law enforcement official it does not follow logically when applying the appropriate principles of mens rea and criminal liability and culpability that an accused who adopted the intent as his own and committed the actus reus did not possess the necessary intent in the only sense the law requires and, consequently, cannot be considered entirely innocent or blameless.

It has been suggested that it the genesis of intent formula is to be considered seriously "why limit entrapment to instigation by police agents?"[215] Certainly such a approach would be equally applicable to instigation by someone other than law enforcement officials where the intent originated with the private person. The fact that the test is not equally applicable to all instigation notwithstanding the source would indicate that the formula is not logically consistent.

Park concluded that the Federal Court's subjective approach is preferable to the hypothetical person or objective test expressed in the minority opinions as it would present "more reliable evidence to the fact-finder."[216] Although the evidence may be more reliable it is concluded that a determination of the predisposition of the accused in the absence of any other factors is an inconclusive and, therefore, an inappropriate method for determining the existence of entrapment.

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[215] Ibid., at 1109
[216] Supra, n. 180 at 272

This thesis concludes that the subjective test or origin of intent formulation is neither adequate nor appropriate as a standard for the determination of the existence of entrapment within the Canadian criminal justice system. As Donnelly stated, "it is a strange doctrine" which renders the determination of guilt or innocence dependant upon whether the accused had previously committed similar offences.[217] He concluded as follows:

> However bad a person may be, however guilty of crime, it is nevertheless a principle of our system of criminal law administration that conviction and punishment must be for some specific act or crime proved...and not for a general criminal depravity or wickedness.

OBJECTIVE - POLICE CONDUCT TEST

The dissenting judgements of Sorrells v. United States and Sherman v. United States have suggested a standard for the determination of the existence of entrapment based upon the concept that certain procedures and practices employed by law enforcement officials, in inducing or instigating the commission of criminal offences in order to obtain evidence upon which to prosecute the accused, are intolerable and cannot be countenanced by the courts. The focus of this test involves on objective determination of,[218]

> ...whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of government powers.

The issue for determination is whether the conduct of the law enforcement officials is likely to induce or instigate the commission of a criminal offence notwithstanding the predisposition of the accused. The objective approach shifts attention from the propensities or predisposition of the individual charged with an offence to the conduct of the law enforcement officials and the likelihood that such conduct will induce only those ready and willing to commit the offence alleged if subjected to such inducements. This approach invokes a doctrine of procedural and judicial administration as opposed to one of substantive law.[219]

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[217] Supra, n. 169 at 1108

[218] Supra, n. 26 at 382

The objective test permits the law enforcement officials to engage in conduct which, when objectively considered, is likely to induce only an individual who is ready and willing to commit the offence to do so. The conduct must exceed the mere offering of an opportunity to commit the offence and must be capable of inducing or instigating the commission of the offence by an individual not so inclined. Consideration of the individual's predisposition, character, reputation or propensities are irrelevant in this approach.[220] However, it has been suggested that the refusal by the minority of the court to consider the accused's previous record deprives them of a factor which is relevant to objective standards of police conduct.[221]

Park indicated that the fact an accused is able to establish persuasion by the law enforcement official capable of inducing a "hypothetical person" to commit the offence is not sufficient in itself as the accused must also establish a casual connection between the officer's conduct and his own commission of the offence. He must establish that the offence occurred in response to the conduct of the officer.[222]

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[219] Supra, n. 57 at 329
[220] Supra, n. 24 at 445
[221] Supra, n. 204 at 177

In Sherman v. United States, Mr. Justice Frankfurter expressed the opinion that the crucial question for determination was whether law enforcement officials conducted themselves in such a manner as to fall below minimum acceptable standards required for the proper use of government power. He indicated that it is wholly irrelevant to determine whether the "intention" originated with the accused or with the law enforcement official, or if the offence was the "creative activity" of the government. He contended that a test which directs its attention to the character and predisposition of an accused person rather than to the conduct of the law enforcement official loses sight of the underlying reason for the defence of entrapment.[223] Mr. Justice Frankfurter expressed the justification for this rejection of the subjective approach and support for the objective standard as follows:[224]

> No matter what the defendants past record and present inclination to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.

Mr. Justice Frankfurter was further of the opinion that all such evidence of predisposition was irrelevant and should be excluded as permissible police activity does not vary "according to the suspicions, reasonable or unreasonable, of the police concerning the defendant's activities."[225]

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222. Ibid., at 175
223. Supra, n. 26 at 382
224, Ibid., at 382-3
225. Ibid., at 383

However, as Park indicated, such broad statements as the above "cannot be applied with mechanical literalism." He further indicated as follows:[226]

> Even under a hypothetical person test, it will sometimes be appropriate to admit evidence bearing on a defendant's 'penchant for criminality.' The ultimate aim of the hypothetical person test is to acquit defendants who have been the subject of improper police conduct, either in hopes of preventing future misconduct, or because the purity of the courts would be soiled by a conviction acquired by unworth action. Sometimes no fair assessment of the decency of an agent's conduct can be made without considering what the agent knew about the defendant's propensity for crime.

In Russell v. United States the majority of the court[227] refused to expand the traditional notion of entrapment, which focuses on the predisposition of the defendant, so as to include circumstances which involve an "intolerable degree of government participation in the criminal enterprise."

Mr. Justice Stewart, in delivering a dissenting opinion in Russell v. United States, expressed the opinion that the proper test for the determination of the existence of entrapment is as follows:[228]

> ...when the agents' involvement in the criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that would induce or instigate the

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[226] Supra, n. 180 at 202-3

[227] Supra, n. 24 at 427. See also Greene v. U.S. 454 F. 2d 783, wherein the United States Court of Appeals accepted the defence of entrapment where federal agents supplied to the accused a still, a still site, equipment, an operator, and sugar; U.S. v. Buevo 447 F. 2d 903, wherein the United States Court of Appeals held that where an informer purchased heroin for an accused who in turn sold it to a federal agent amounted to entrapment as a result of the "creative activity" of the government; U.S. v. Chisum 312 F. Supp. 1307, where it was held that the fact that a federal agent supplied the accused with counterfeit money, the receipt of which money constituted the subject matter of the charge, was sufficient to support a defence of entrapment.

[228] Ibid., at 445

> commission of a crime by one not ready and willing to commit it, then - regardless of the character or propensities of the particular person induced - ...entrapment has occurred.

He further expressed the view that the objective test is the only approach which is truly consistent with the underlying rationale of the defence of entrapment and that the very basis of the defence demands adherence to an approach that directs attention to the conduct of the law enforcement officials rather than to a consideration of whether the accused evidenced a propensity to commit the offence charged.[229]

The objective standard is valid only insofar as one is prepared to accept that limits of permissible conduct of law enforcement officials can be established without consideration of such relevant factors as the predisposition of the accused, the nature and seriousness of the offence charged, and that conduct objectively determined to be intolerable in one situation remains equally objectionable under a wholly different set of circumstances.

Mr. Justice Rehnquist, in delivering the judgement of the court in Russell v. United States, in rejecting the objective approach, properly expressed the opinion that it was not particularly desirable to grant complete immunity from prosecution to an individual who planned to commit an offence and then proceeded to commit that offence after being subjected to inducements which might have "seduced an hypothetical individual who was not so predisposed."[230] Clearly an individual who had been predisposed to commit an offence and was merely waiting for the appropriate opportunity to proceed and who is subjected to a form of inducement which would have incited a hypothetical person who was not predisposed to commit the offence should not be permitted to avail himself of the defence of entrapment. Obviously factors other than an objective standard of police conduct as it relates to a hypothetical individual must be considered in the determination of entrapment.

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[229] Ibid., at 441
[230] Ibid., at 434

The American Law Institute, in their Model Penal Code, endorsed the objective test expressed by the minority of the United States Supreme Court.[231] It was suggested that the American Law Institute intended to establish an objective, rather than a subjective, approach by employing the phrase "methods of persuasion or inducement which create a substantial risk that such an offence will be committed by persons other than those who are ready to commit it."[232] This view of the subjective test was further developed in Grossman v. State[233] as follows:

> The objective test can be stated as follows; unlawful entrapment occurs when a public law enforcement official, or a person working in cooperation with him, in order to obtain evidence of the commission of an offence, induces another

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[231] Model Penal Code, 1962, section 2.13 provides as follows:
(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offence, he induces or encourages another person to engage in conduct constituting such offence by either;
(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited, or
(b) employing methods of persuasion or inducement which create a substantial risk that such an offence will be committed by persons other than those who are ready to commit it,
(2) except as provided in subsection (3) of this Section, a person prosecuted for an offence shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the court in the absence of a jury.

[232] Paul W. Williams "The Defence of Entrapment and Related Problems in Criminal Prosecution" (1959) 28 Fordham L. Rev. 399 at 415

[233] 457 P. 2d 226 at 229 (1969)

> person to commit such an offence by persuasion or inducement which would persuade an average person other than one who is ready and willing to commit such an offence. Conversely, instigation which would induce only a person engaged in an habitual course of unlawful conduct or gain do not constitute entrapment.

Mr. Justice Musk, in People v. Barraza,[234] for the Supreme Court of California, concluded that the proper test for entrapment in California is as follows:

> ...was the conduct of the law enforcement agent likely to induce a normally law abiding person to commit the offence? For the purpose of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully...but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law abiding person to commit the crime.

In attempting to establish guideline for determining the impermissible conduct of law enforcement officials, the court expressed the following opinion:[235]

> ...if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the crime other than ordinary intent, entrapment will be established...Second, affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding person will likewise constitute entrapment.

The propriety of the conduct of the law enforcement official is based upon its probable effect upon a hypothetical average person or, as the Model Penal Code indicated, "persons other than those who are ready to commit it." However, any test based upon the concept of the "normally law-abiding" person or the "average" person rather than an individual "ready and willing to commit the crime"[236] possesses the potential danger of "emasculating" the defence of entrapment. It has been suggested that,[237]

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[234] 23 Cal. 3d 675, 591 P. 2d 947 at 955, 153 Cal. Rptr. 459 (1979)
[235] Ibid., at 955
[236] Supra, n. 26 at 384

> ...most people will not commit a serious crime unless subjected to extreme pressure or duress. Barraza is likely to narrow the scope of the defence still further; the term 'normally law-abiding person' has connotations of moral rectitude absent from the notion of the 'average person.' Only threats or some outrageously attractive proposition would cause such a person to commit a felony and many subtler forms of entrapment would escape condemnation.

Park expressed difficulty in accepting the formulation for the determination of entrapment employing the concept of the "hypothetical person" as described by the leading decision of Grossman v. State, one of the few decisions to accept the approach or standard ennunciated in the minority opinions in Sorrells v. United States and Sherman v. United States.[238] He indicated that if prohibited inducements are limited to those which would persuade an average person to commit a criminal offence the defence of entrapment would be severely limited as the average person, although perhaps willing to commit a petty offence, would be unwilling to commit a serious offence unless severly pressured or threatened. A standard based upon the proclivities of the average person would too narrowly define the extent of entrapment.[239] However, he concluded that it is unlikely that the reference to "average person" was intended to endow "the hypothetical person with the strength of character possessed by an average person." Were the hypothetical person possessed of such strength of character a conviction would have been required in Sherman v. United States.[240] Of course one must conclude that the unsatisfactory alternative to providing the hypothetical person of the objective approach with the strength of character of an average law-abiding citizen would be to provide him with the strength of character of an average person with a propensity towards criminal activities. Certainly it is undesirable that conduct of the law enforcement official is to be determined impermissible according to such a minimal standard.

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[237] Paul Klevin "People v. Barraza, California's latest attempt to Accomodate an Objective Theory of Entrapment" (1980) Cal. L.R. 746 at 757-8

[238] Supra, n. 180 at 172. See also United States v. Chissum 312 F. Supp. 1307 (1970); United States v. Mullen 216 N.W. 2d 375 (1974); and People v. Turner 390 Mich. 71, 210 N.W. 336 (1973)

[239] Ibid., at 172-3

Park suggested that a potential danger of employing the hypothetical person approach is that by focusing on the conduct of the law enforcement officials rather than the criminal proclivities of the accused "it creates the risk of acquitting dangerous chronic offenders."[241]

Any test which focuses solely upon the behaviour of the law enforcement official must of necessity provide substantial leeway.[242] The objective test is unlikely to obtain the desired effect of maintaining public confidence in the criminal justice system for unless the conduct of the law enforcement officials is outrageous it is unlikely that the public will be offended by the conviction of an accused who was predisposed to commit the criminal offence and then proceeded to actually commit the actus reus following the involvement of the law enforcement official. Park suggested as follows:[243]

> It is more likely that the judiciary will lose respect by enforcing an entrapment defence which ignores culpability and

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240. Ibid., at 174
241. Ibid., at 216
242. Ibid., at 220
243. Ibid., at 224-5

> seeks to control police conduct by acquittal of professional criminals.

Cohn indicated that the acceptance of the objective approach would "end the open season on past offenders and predisposed individuals" currently enjoyed by the law enforcement officials and would raise the rights of these individuals to an equivalent level to "those who have not been branded 'predisposed'."[244] He further indicted that the objective approach is the only adequate method available to the courts to eliminate the undesirable misconduct on the part of the law enforcement officials and their agents.[245]

This observation is based upon the assumption that the proposed method of acquitting an accused or staying a prosecution is an available and effective method of controlling undesirable misconduct on the part of the law enforcement officials, and that it is within the jurisdiction of the Canadian courts to supervise the law enforcement officials. This issue will be subsequently dealt with in greater detail.

Patterson responded to the criticism of the objective approach that it results in the acquittal of accused persons who have committed all the constituent elements of the offence by indicating that in the case of offences instigated or induced by law enforcement officials "the accused is not solely responsible for the commission of the offence for which he has been charged." [emphasis added][246]

In response to this observation it will be noted that there is a marked distinction between an individual who is not solely responsible for the commission of an offence and one who is not responsible at all. It the accused was not solely responsible, insofar as he was acting in conjunction with another, this will not negate his own culpability arising from his participation in the commission of the offence. It merely raises the issue of whether his accomplice will also be liable to prosecution.

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[244] Roy M. Cohn "The Need for an Objective Approach to Prosecutorial Misconduct" (1980) 46 Brooklyn L. Rev. 249 at 266

[245] Ibid., at 267

[246] Robert K. Patterson "Towards a Defence of Entrapment" (1979) 17 Osgoode Hall L.J. 261 at 281-2

Similarly, if the fact that the accused was not solely responsible for the commission of the offence, insofar as he was a reluctant participant who was persuaded, induced, or instigated to participate in the commission of the offence, his guilt or innocence is to be determined by establishing all constituent elements of the offence, and the inducement is relevant primarily to the question of mitigation of sentence.

The approach adopted by certain of the Canadian courts is exemplified in the Ontario Court of Appeal decision of R. v. Ormerod, wherein Mr. Justice Laskin, in obiter dicta, and without arriving at any conclusion as to the acceptability of entrapment as a defence, indicated that in establishing a defence of entrapment the issue for determination is not whether the offence has been committed but rather whether the methods employed by the law enforcement officials are to be tolerated. He defined the elements of a defence of entrapment as not including a situation where an undercover officer merely provided the opportunity or occasion for an individual to commit an offence, but whether the officer's conduct amounted to "such calculated inveigling and persistent importuning...as to go beyond ordinary solicitation."[247] Clearly he is indicating that, if a substantive defence of entrapment is to exist in the Canadian criminal justice system, the appropriate focus of attention is on the conduct of the law enforcement officials with no mention being made of the predisposition or propensities of the particular accused.

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[247] 247. Supra, n. 113 at 10-11

In R. v. Bonnar, the Nova Scotia Supreme Court, Appeal Division, applied the test indicated in R. v. Ormerod in order to stay proceedings against an accused in circumstances where it was "clear that the accused did not have a prior intention to commit the offence with which he was charged but committed it only because the conduct of the agent provocateur was...such calculating, inveigling and persistent importuning as went beyond ordinary solicitation."[248] The court appears to be adopting and applying the approach suggested in R. v. Ormerod as the appropriate means for the determination of the existence of entrapment.

In Kirzner v. The Queen, Chief Justice Laskin, in obiter dicta, expressed the need for a balance between "reasonable" latitude for the law enforcement officers in their investigation and prevention of the spread of criminal activity and behaviour of law enforcement officials which extends "beyond any reasonable latitude."[249] He indicated that it is only in circumstances where the law enforcement officials go beyond mere solicitation or mere decoy work and actively organize a scheme of entrapment or ensnarement in order to prosecute the person so implicated that it is proper to speak of entrapment and its effect upon the prosecution of an individual so drawn into the commission of the offence.[250] He further indicated that in the subjective approach an

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248. Supra, n. 5 at 192
249. Supra, n. 7 at 492
250. Ibid., at 494

accused with a predisposition to commit the offence alleged would be unable to avail himself of the defence of entrapment regardless of the degree of involvement by law enforcement officials.[251] He further indicated that there is is a developing disposition in the lower courts of the United States to elect to apply the objective approach as being one which avoids the principal problems that arise in attempting to establish the predisposition or propensities of a particular accused.[252] Although there is no conclusive decision indicting which approach is appropriate within the Canadian criminal justice system, clearly the general tenure of the remarks indicates a preference for the objective formulation.

Mr. Justice Ritchie, in obiter dicta comments in Amato v. The Queen, indicated that the defence of entrapment enters into the determination of guilt or innocence only when tactics of law enforcement officials are such as to leave no room for the formation of independent criminal intent by the accused. He indicated that where the crime would not have been committed but for the "calculated inveigling or persistent importuning" of the law enforcement officer it becomes apparent it was[253]

> ...the creative activity of the police rather than the intention of the accused which gave rise to the crime committed.

He was further of the opinion that in such circumstances the essential element of "mens rea would be absent and the accused's defence would be established."[254] It is difficult to comprehend how the original conception of an offence by another, with nothing else intervening, would negate the mens rea of an accused who had adopted the original intent as his own.

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[251] Ibid., at 494
[252] Ibid., at 496
[253] Supra, n. 2 at 497
[254] Ibid., at 499

Mr. Justice Estey, in his dissenting opinion established the following criteria which must be determined in order to invoke the defence of entrapment:[255]

> The principal elements or characteristics of the defence are that an offence must be instigated, originated or brought about by the police and the accused must be ensnared into the commission of that offence by the police conduct. The purpose of the scheme must be to gain evidence for the prosecution of the accused for the very crime which has been so instigated and the inducement may be but is not limited to deceit, fraud, trickery or reward, and ordinarily but not necessarily will consist of calculated inveigling and persistent importuning...the scheme so perpetrated must in all the circumstances be so shocking and outrageous as to bring the administration of justice into disrepute.

As was previously indicated, Mr. Justice Estey had stated that "by itself and without more the predisposition in fact of the accused is not relevant to the availability of the defence."[256] From these indications it would appear obvious that members of the Supreme Court of Canada are considering either the objective approach as enunciated by the minority opinions expressed in the previously cited United States authorities or an uniquely Canadian adaptation of the objective and subjective standards.

It has been suggested that the United States federal subjective or creative activity test is preferable to the objective or hypothetical person approach as the latter creates a greater likelihood of unjust treatment of the accused and that the deterrent effect upon the law enforcement officials is not sufficient to justify the risk.[257] Further objections to the objective approach are its leading to the acquittal of chronic offenders by focusing on the conduct of the law enforcement officials, and the risk of convicting non-disposed individuals who might never have engaged in the criminal activity but for the instigation or the inducement of the official.[258]

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[255] Ibid., at 524
[256] Ibid., at 524
[257] Supra, n. 180 at 170

Clearly these are valid objections which are rooted in the inadequacy of the objective approach and which, consequently, render it inconclusive and therefore inappropriate as a method of determining the existence of entrapment within the Canadian criminal justice system.

OUIMET COMMITTEE TEST

The Ouimet Committee, in formulating a recommendation for the adoption of the defence of entrapment in Canada, indicated that "the function of law enforcement officials was to detect crime, not to create or encourage crime."[259] In the detection of crime it is considered proper for the official to employ "stratagems" or to afford a specific occasion for an individual to commit an offence if that individual exhibited a pre-existing intention to commit the offence as evidenced by a continuing course of conduct. However, they concluded as follows:[260]

> ...the use of persuasion or unfair means to induce the commission of an offence by a person who had no pre-existing intention to commit it, and who would not have committed the offence but for the instigation of law enforcement officials or an agent provocateur employed by them, is in the opinion of the Committee wholly indefensible.

The Nova Scotia Supreme Court, Appeal Division, in R. v. Bonnar, properly interpreted the approach by the Ouimet Committee as a reference to entrapment as known to the law of the United States and ennunciated in the majority opinions of Sorrells v. United States and Sherman v. United States.[261]

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[258] Ibid., at 216-7

[259] Report of the Canadian Committee on Corrections, Toward Unity, Criminal Justice and Corrections, (1969) at 75-6

[260] Ibid., at 75

The Ouimet Committee considered that the appropriate line of demarcation between proper and improper law enforcement techniques was indicated in the following comment by Mr. Justice Lamont in Amsden v. Rogers:[262]

> I do not say that in their efforts to secure evidence in cases where crimes have been committed the officers of the law are not sometimes entitled to resort to pretense and even false statements. There may be cases where that is necessary in the interests of justice to enable them to secure the evidence, and the fact that an officer has resorted to subterfuge may not cast discredit upon the evidence which he discovers by means thereof. But in my opinion, it is a different matter where the false statements are made, not for the detection of crime committed but for the purpose of inducing its commission in order that the person making these statements may be able to prefer a charge for the offence committed at his solicitation...

The Committee briefly examined both the United States and Canadian authorities and concluded that within the Canadian criminal justice system there has not developed a rule of public policy precluding the conviction of an individual who has intentionally committed an offence as the result of inducement or instigation by law enforcement officials or their agents. They further concluded that the Canadian courts have consistently held that if all requisite elements of an offence necessary for a conviction have been committed the fact of official inducement or instigation affords no defence to the accused so instigated.[263]

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[261] Supra, n. 5 at 187
[262] (1916) 26 C.C.C. 389 at 392 (Sask. S.C.)
[263] Ibid., at 78

However, having made these observations, the Committee recommended the enactment of legislation to provide for a substantive defence of entrapment as follows:[264]

> 1. That a person is not guilty of an offence if his conduct is instigated by a law enforcement officer, for the purpose of obtaining evidence for the prosecution of such person, if such person did not have a pre-existing intention to commit the offence.
>
> 2. Conduct amounting to an offence shall be deemed not to have been instigated where the defendant had a pre-existing intention to commit the offence when the opportunity arose and the conduct which is alleged to have induced the defendant to commit the offence did not go beyond affording him an opportunity to commit it.
>
> 3. The defence that the offence had been instigated by a law enforcement officer or his agent should not apply to the commission of those offences which involve the infliction of bodily harm or which endanger life.

The Ouimet Committee approach directs attention towards the predisposition or pre-existing intention of the accused while simultaneously permitting a degree of official involvement or inducement provided that such does not amount to more than merely providing an opportunity for the individual to commit the offence. It is concluded that such an approach, with its similarity to the subjective or creative activity standard found in the United States authorities, will exhibit many of the frailties of that test and, consequently, such an approach is not considered to be sufficiently flexible or comprehensive and, therefore, is inadequate for its purpose.

PROPOSED TEST

It is concluded that both the subjective and objective standards proposed in the American authorities and the approach recommended by the Ouimet Committee in Canada focus too narrowly upon a single aspect of either the misconduct of law enforcement officials or upon the predisposition or propensities of the accused to commit the offence alleged rather than directing its mind to a full consideration of all relevant surrounding circumstances. It is proposed that the appropriate approach for the determination of the existence of entrapment within the Canadian criminal justice system, in keeping with the traditional Canadian policy of considering all relevant surrounding factors and circumstances, would be a combined comprehensive subjective-objective or hybrid approach.

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[264] *Ibid*., at 79-80

M. L. Friedland also was of the opinion that neither the objective nor the subjective model is ideal nor is it consistent with the present Canadian judicial philosophy. He indicated that the objective model, which is designed to control the conduct of the law enforcement officials, is inconsistent with the present judicial philosophy in Canada of not using "the trial of an accused to control the police,"[265] whereas the subjective test would permit the prosecution to prove a previous criminal record of convictions in order to establish a pre-existing intent or propensity on the part of the accused to commit the offence alleged.[266] He proposed as a more appropriate test the following:[267]

> The jury should acquit the accused if they are satisfied that the police or their agent's conduct in investigating the crime has gone substantially beyond what is reasonable, having regard to all the circumstances, including, in particular, the accused's pre-existing intent.

The difficulty with this proposed test is in defining that which would constitute the parameters of conduct which is substantially reasonable. However, such a difficulty should not deter one from attempting to establish by means of judicial decision the limits which will achieve the desired objectives of a doctrine of entrapment.

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[265] Supra, n. 12 at 23
[266] Ibid., at 24
[267] Ibid., at 25

Such an approach has been taken by the California Supreme Court in People v. Benford,[268] which attempted to combine the elements of both the subjective and the objective approaches to obtain a comprehensive composite standard. The combined or hybrid approach taken was a combination of a recognition by the courts that they are unwilling to condone certain intolerable conduct by the law enforcement officials "out of regard for its own dignity" while simultaneously considering "whether the intent to commit the crime originated in the mind of the defendant or in the mind of the entrapping officer...."[269]

In People v. Barraza, Mr. Justice Musk reiterated the position currently applied by the California courts as representing a "hybrid position, fusing elements of both the subjective and the objective theories of entrapment."[270] The court, in attempting to assist in the determination of conduct by law enforcement officials which constituted entrapment, proposed the following guideline:[271]

> Finally, while the inquiry must focus primarily upon the conduct of the law enforcement agent, that conduct is not to be viewed in a vacuum; it should also be judged by the effect it would have on a normally law-abiding person situated in the circumstances of the case at hand. Among the circumstances that may be relevant for this purpose, for example, are the transactions preceeding the offence, the suspects response to the inducements of the officer, the

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268. 53 Cal. 2d 1, 345 P. 2d 928 (1959) (Calif. S.C.)
269. Ibid., at 934
270. Supra, n. 234 at 954
271 Ibid., at 955-6

> gravity of the crime, and the difficulty of detecting instances of its commission....We reiterate, however, that under this test such matters as the character of the suspect, his predisposition to commit the offence, and his subjective intent are irrelevant.

The court's rejection of the hybrid approach in *People v. Barraza* was perceived as a long overdue attempt to bring coherance to the doctrine of entrapment. It has been contended that the unsuccessful attempt by the California courts to establish a "hybrid approach" for the determination of entrapment by attempting to reconcile the objective and subjective standards was "doomed from the outset because the two theories are logically incompatible."[272]

However, it has been further suggested that, although the test in *People v. Barraza* was phrased objectively, the court appeared to be unwilling to "embrace the objective theory wholeheartedly," as the vague "normally law-abiding person" is possibly drawing attention away from the conduct of the law enforcement officials.[273]

It is concluded that a test comprising those elements considered relevant by the California Supreme Court in *People v. Barraza* and, additionally, a consideration of the predisposition or propensity of the accused to commit the particular offence induced or instigated would constitute the appropriate formulation of a Canadian approach to the determination of the existence of entrapment within the criminal justice system.

Such a test would establish the existence of entrapment upon a determination of the degree of conduct by law enforcement officials or their agents in the instigation of a criminal offence which would be considered intolerable having regard to the propensities or predisposition of the particular accused to commit the criminal activity alleged and also having consideration for the nature and seriousness of the offence concerned.[274] Conduct of a law enforcement official which would be considered intolerable in the instance of a naive and inexperienced individual having no predisposition to commit the offence could conceivably be held to be acceptable in the case of an individual readily predisposed and willing to commit the offence. However, even in the instance of the latter individual there would be a degree of conduct on the part of the law enforcement officials which would be impermissible. Also the more serious the offence the greater would be the degree of permissible official involvement, with the limitation that certain of the most serious offences involving violence or bodily harm to another person would not be available to a defence of entrapment. It is inconceivable that the standard of permissible conduct would remain the same for a serious violation of a prohibited act as it would for a minor offence. Similarly, the nature of the offence would be a determining factor as the degree of inducement or involvement would depend upon the degree which the defendant's business would normally subject him to or which was usual for the type of business involved,[275] such as the normal reticence or caution which a trafficker in narcotics might express when confronted with a new customer.

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[272] *Supra*, n. 237 at 746
[273] *Ibid.*, at 747

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[274] See also supra, n. 176 at 1337, wherein a similar test was proposed involving three considerations; the first looking to the type of inducement, the second looking to the nature of the offence alleged, and the third looking to the prior activity of the accused.

[275] Ibid., at 1340

The question for consideration by the courts would be whether the particular accused, having regard to his predisposition or propensity to commit the criminal offence alleged, was subjected to an intolerable degree of official inducement or instigation having regard to the seriousness of the charge and the nature of the offence.

Such a proposed test involving a combination of subjective and objective approaches was considered and approved by M. L. Friedland who indicated as follows:[276]

> ...the police conduct and the accused's pre-existing intent would both be factors in determining whether a defence should apply. It is the combination of the two factors that make it unjust to convict in any particular case. Society should allow the police very little scope for entrapping the person without a pre-existing intent, but substantially more scope in the case of a person who has a pre-existing intent. The test should reflect that the propriety of police conduct will vary from case to case depending upon the crime charged and the accused's prior intent to engage in the activity.

In drafting such a test it has been suggested that "a simple formulation would be preferable to an elaborate set of provisions which attempts to make too many fine distinctions."[277]

Such a compromise has also been briefly referred to by D. L. Rotenberg who indicated as follows:[278]

> If an objective standard is required, then entrapment becomes the inducement to crime of an otherwise innocent person by the police using inducing conduct which falls below the objective norm. This test is a compromise, actually, between the ostensible majority and minority views in Sherman; it combines an objective test to control police practices with the use of the disposition of the offender as an alternate test.

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[276] Supra, n. 12 at 24
[277] Ibid., at 24
[278] Supra, n. 54 at 895-6

It has been suggested that as the causal force of the official instigation increased, the culpability of the accused decreased. It was further suggested as follows:[279]

> ...the diminishment of culpability due to government action will vary in degree according to the directness or, more properly, the force of the government causation - that is, according to the moral certainty with which criminal action would be elicited by the particular police conduct. All courts have felt the mere 'but for' causation - the mere fact that but for the police activity the crime would not have been committed, where the police have made no actual suggestion that it should be committed is not sufficiently reductive of culpability to provide an entrapment defence.

The proposed test would require amendments to the rules of evidence permitting the introduction of character evidence and the accused's prior record in order to establish his predisposition to commit the offence. Such amendments would permit the admission of such evidence in circumstances where an accused admitted that he had committed the offence, but raised the defence of entrapment.

Such a proposed test would be available for the determination of entrapment at any stage of the proceedings regardless of the remedy employed. However, it should be noted that if entrapment is an issue relevant only to the mitigation of sentence, rather than going to the question of innocence or guilt, the proposed test would be applied by a judge rather than a jury.

It is concluded that such a proposed test would have the advantage of eliminating many of the previously indicated objections voiced in opposition to either the subjective or the objective approach.

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[279] Supra, n. 176 at 1337

The obvious disadvantage is that the test is more comprehensive and, consequently, considerably more complicated and difficult to apply. However, the application of such a proposed test is not impossible and the increased degree of difficulty in application is preferable to the present fractional or segmented approach, and is consistent with the philosophy of the Canadian courts to examine all relevant factors determinative of the issue.

CHAPTER FIVE

CLASSES OF OFFENCES TO WHICH A DEFENCE OF ENTRAPMENT IS APPLICABLE

Law enforcement activities which most often are the subject of allegations of entrapment are found in the area of "consensual crimes." These consist of offences involving a willing victim or participant who is usually unprepared to either indicate that an offence has occurred or to cooperate in the investigation. Consequently, normal investigative and preventive techniques are rendered inadequate. The defence of entrapment has been applied in response to offences alleging gambling,[280] prostitution,[281] liquor,[282] narcotics,[283] licensing,[284] abortion,[285] bribery,[286] conspiracy,[287] and breaking and entering,[288] to name but a few.

Offences involving a willing "victim" are extremely difficult to detect without active participation and inducement by law enforcement officials.[289] Mr. Justice Roberts, in *Sorrells v. United States*, expressed the opinion that, as the defence of entrapment is founded upon the conviction that certain conduct on the part of law enforcement officials in the instigation of criminal activity is so abhorrent as to be intolerable, "public policy forbids such sacrifice of decency." He concluded as follows:[290]

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[280] *People v. Lindsay* 91 Cal. App. 2d 914 (1949)

[281] *State v. McCormish* 59 Utah 58 (1921); *R. v. Sneddon and Stevenson* [1967] 1 W.L.R. 1051 (C.C.A.)

[282] *State v. Jarvis* 105 W.V. 499 (1929); *Amsden v. Rogers*, *supra*, n. 262

[283] *People v. Carlton* 83 Cal. App. 2d 475 (1948); *R. v. Ormerod*, *supra*, n. 113

[284] *R. v. Timar* 5 C.R.N.S. 195, [1969] 3 C.C.C. 185, [1969] 2 O.R. 90 (Co. Ct.)

[285] *People v. Ruffington* 98 Cal. App. 2d 455 (1950); *R. v. Kotyszyn*, *supra*, n. 88

[286] *People v. Finkelster* 200 F. 2d 904 (1950)

[287] *R. v. O'Brien*, *supra*, n. 91

[288] *Lemieux v. The Queen*, *supra*, n. 94; *R. v. Chandler* [1913] 1 K.B. 125

[289] *Supra*, n. 176 at 1339

> The enforcement of this policy calls upon the court, in every instance where alleged entrapment of a defendant is brought to its notice, to ascertain the facts, to appraise their effect upon the administration of justice, and to make such order with respect to the further prosecution of the cause as the circumstances require.
>
> This view calls for no distinction between crimes mala in se and statutory offences of lesser gravity....

It has been suggested that Mr. Justice Roberts' opinion that the doctrine of entrapment was rooted in a public policy need to protect the "purity of government and its processes" from government instigated offences and to protect the purity of the courts should be interpreted as follows:[291]

> This view renders unnecessary any distinction based upon the nature of the offence, that is, whether it is one at common law or merely a creation of statute, whether a crime mala in se or a statutory offence of lesser gravity. Consequently the question of entrapment has no connection with guilt or innocence.
>
> ...It follows that the defendant's bad reputation or previous transgressions are outside the scope of inquiry. A balancing of equities between the government and the accused has no place, for to say the conduct amounting to entrapment is condoned because of defendant's bad reputation or prior lapses 'is wholly to disregard the reason for refusal of the processes of the court to consummate an abhorrent transaction.'

However, the court in Sorrells v. United States indicated that the present case was not a proper occasion "to consider hypothetical cases of crime so heinous or revolting that the applicable law could admit to no exceptions."[292] Mr. Justice Roberts, however, expressed the opinion that the defence of entrapment should apply equally to all statutes unless specifically excluded from that statute.[293]

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[290] Supra, n. 1 at 455

[291] Supra, n. 169 at 1102

Is has been suggested that more recent United States Supreme Court decisions appear to have, sub silentio, extended the applicability of the defence to all statutes, and claims that the defence should not apply to certain offences are usually based upon "dicta coached in tentative terms."[294]

However, in Whittier v. United States, the court indicated as follows:[295]

> This is not to say that the defence of entrapment might not itself be subject to some limitations.

It would appear unlikely that the courts could extend the defence of entrapment to serious offences involving bodily injury and still maintain the rationale of protecting the purity of the courts.

The Ouimet Committee recognized that individuals charged with the commission of certain offences should not be permitted to avail themselves of the defence of entrapment as a result of the serious nature of the offence alleged. The Committee did not elaborate on those offences which are deemed sufficiently serious to warrant the exclusion of the defence. However, there is a reference in a recommended proposed legislative enactment that the defence not be made available to those charged with offences involving the infliction of bodily injury or which endanger life. Further reference was made to the limitation placed on the defence of duress pursuant to section 17 of the Criminal Code.[296] This section provides, in part, as follows:

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[292] Supra, n. 1 at 451
[293] Ibid., at 455-7
[294] Supra, n. 195 at 1216
[295] Supra, n. 20 at 76

> 17 ...but this section does not apply where the offence that is committed is high treason, or treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm or arson.

It was recognized in the American Law Institute Model Penal Code, referred to by Chief Justice Laskin in Kirzner v. The Queen, that the social interests in control of certain offences such as crimes of violence "outweigh that involved in disapprobation of undesirable police behaviour."[297] This position is desirable as there are more effective methods of controlling the conduct of law enforcement officials than by permitting persons charged with a serious offence, although committed as the result of official instigation, to escape criminal liability.

It has been suggested by the Law Commission in England that this need for exceptions is an indication of the flawed character of a defence of entrapment. The Commission expressed its conclusion as follows:[298]

> There seems no basis in logic for making this exception. Nor does public policy require that the defendant should not allow himself to be induced to commit this kind of offence; public policy requires rather that he should not permit himself to be induced to commit any offence at all. Yet if it be admitted that some such exception has to be made it becomes difficult to justify the defence in other serious cases, such as 'pushing' hard drugs. We believe these conflicting considerations arise from the fundamental illogicality of the defence, which fails to discriminate between a proper reflection of the defendant's guilt and the more important problem of controlling the activities of the State's law enforcement agencies.

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[296] Supra, n. 259 at 79

[297] Supra, n. 231 at 498

[298] Supra, n. 43 at 47

In Amato v. The Queen, Mr. Justice Estey acknowledged that it is with the "consensual" offences that the issue of entrapment will most naturally arise and that there is seldom either a complaint or external evidence that a crime has been committed. Law enforcement officials must, of necessity, respond with different investigative and preventative techniques and therefore, informers, spies, decoys, undercover agents, and agent provocateurs must be employed.[299] However, he further indicated that whatever may be the scope of such a defence,[300]

> ...it must be clear that the defence arising in this circumstance does not operate in the case of all offences. In the Model Penal Code of 1962...the defence is 'unavailable when causing or threatening bodily injury is an element of the offence charged...' (s. 2.13 (3)), presumably on the basis that the social interest in controlling the accused's behaviour outweighs that of controlling police behaviour. There may be other categories of offences to which the defence will not run but this again will develop as the judicial system of criminal justice may require.

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299. Supra, n. 2 at p. 35. Although it may be argued that "consensual" activities should not be considered to be crimes at all having regard to their consensual nature and the lengths the police must go to in order to gain a conviction, it must be remembered that the criminal law represents the values and social mores of a given society at a particular time. To suggest that activities of a consensual nature should not be made illegal would be to permit such activities as prostitution, sale and use of narcotics, gambling, misuse of liquor, and abortions, to name but a few. Although changes in social values may eventually result in certain of these activities being made legal, at present they are deemed unacceptable practices by society as a whole. The fact that the police may have difficulty in enforcing a particular offence or that it is consensual in nature should not have the effect of automatically rendering the activity legal.

300. Ibid., at 36

CHAPTER SIX

CONSIDERATION OF LAW ENFORCEMENT OFFICIALS AS ACCOMPLICES WHOSE TESTIMONY REQUIRES CORROBORATION

The rule of practice of judges issuing a warning to the jury of the dangers of convicting an accused on the uncorroborated evidence of an accomplice has, through the years, "become virtually equivalent to a rule of law."[301] It therefore becomes necessary to determine whether the agent provocateur or other undercover officers or their agents are accomplices of the instigated accused, thus requiring corroboration of their testimony.

The Criminal Code defines an accomplice or party to an offence as follows:

> 21. (1) Everyone is a party to an offence who
> (a) actually commits it,
> (b) does or omits to do anything for the purpose of aiding any person to commit it, or
> (c) abets any person in committing it
>
> (2) where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

It has been suggested that a possible justification for a law enforcement official being considered an accomplice of the instigated accused where entrapment has been established and, therefore, requiring corroboration of his testimony is as follows:[302]

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[301] 12 C.E.D. (West. 3rd) at 1046. See also R. v. Vetrovec; R. v. Gaja (1982) 41 N.R. 606 at 611-12 (S.C.C.)

> The purpose of the accomplice rule...is to prevent conviction based upon testimony that is likely to be perjured. For that reason the test of an accomplice should be whether the nature of the offence and the witnesses' connection with the defendant is such that there are good reasons for believing he will be tempted to distort the truth in order to insure the defendant's conviction. In applying the test the courts should consider whether the witness is an informer, spy, or a stool pigeon. The testimony...clearly should be scrutinized with care.

It would appear that this proposed test is confusing the rationale for an accomplice rule and the actual determination of who is an accomplice. Certainly there is reason to fear that an accomplice may commit perjury, but the fear of the commission of perjury or the unreliability of the testimony is not determinative of who is an accomplice. An accomplice is determined by applying the definition contained within the Criminal Code.

Mr. Justice Riley, in the Alberta Supreme Court decision of R. v. Coughlan, Ex Parte Evans,[303] correctly interpreted the provisions of the Criminal Code and the Supreme Court of Canada decision of Vigeant v. The Queen[304] as supporting the proposition that the evidence of a law enforcement officer's spy who was such from the outset of the investigation need not be corroborated as he was not an accomplice. He stated the proposition in the following terms:[305]

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[302] Supra, n. 169 at 1122

[303] [1970] 3 C.C.C. 61, 8 C.R.N.S. 201 (Alta. S.C.)

[304] 54 C.C.C. 302, [1931] 3 D.L.R. 512, [1930] S.C.R. 396 (S.C.C.)

> The law is not that the police spies are accomplices who need not to be corroborated but rather if they are police spies they need no corroboration because they are not accomplices. A person who is not an accomplice is not a party and does not come within the ambit of section 21 of the Criminal Code.

Notwithstanding that a law enforcement officer or his agent are not accomplices to an accused whom they have instigated or induced to to commit an offence and, consequently, whose testimony does not require corroboration, it is still necessary to determine whether a rule should exist wherein a trial judge would be required to warn the jury that the evidence of such a witness must be scrutinized with great care.

The rationale for considering a law enforcement official or his agent as an accomplice whose testimony requires corroboration, or as a witness whose evidence should be accompanied by a warning to the jury that it should be carefully scruntinized, has been dealt with by the

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[305] Supra, n. 303 at 69. See also R. v. Timar, supra, n. 6, wherein the Ontario County Court held that an agent provocateur was not an accomplice; C. C. Savage, "Who is an Accomplice" 3 C.L.Q. 198 at 212-3; R. v. Clay (1946) 88 C.C.C. 36, 1 C.R. 327 (Que. C.A.) wherein it was held that an agent provocateur who assisted the police was not an accomplice and the rule with respect to corroboration of the testimony of an accomplice was inapplicable; R. v. Murphy [1965] N.I. 138, wherein Waller, J., held that the rule concerning corroboration did not apply to officers who were pretending to be an accomplice as they were not true accomplices; R. v. Park Hotel [1966] 4 C.C.C. 158 (Ont. Dist. Ct.) wherein it was held that special officers employed to enforce provincial laws have as their duty the detection and prosecution of infringements of statutory prohibitions and their evidence does not require corroboration nor are they to be discredited; and R. v. Sneddon and Stevenson, supra, n. 281, wherein the English Criminal Court of Appeal rejected the contention that a police officer who provided the opportunity for solicitation by a prostitute was an accomplice whose testimony required corroboration.

Saskatchewan Supreme Court in *Amsden v. Rogers*.[306] The court held that a law enforcement official or his agent or an informer in the employ of the government for the purpose of detecting offences and providing evidence for the prosecution of the offences is not an accomplice and, consequently, the rule that it is unsafe to convict on the uncorroborated evidence of such a witness is inapplicable. However, the court did indicate that in circumstances where a law enforcement official or his agent makes a false statement, not for the purpose of detecting a crime already committed, but for the purpose of inducing or inciting the commission of a criminal offence in order to obtain evidence for the prosecution of the person so instigated, the "evidence of such a witness must...be scrutinized with great care."[307]

The appellate Division of the Supreme Court of Ontario, in *R. v. McCranor*,[308] held that where an *agent provocateur*,

> ...only put himself in the scheme for the purpose of convicting the guilty he was a good witness and his testimony did not require confirmation as that of an accomplice would do; he was not an accomplice for he did not enter the conspiracy with the mind of a co-conspirator, but with the intention of betraying it to the police with whom he was in communication. At the same time from the facts of his joining

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[306] *Supra*, n. 262 at 390. See also *R. v. Mullins* (1848) 3 Cox Crim *Cases* 526, wherein it was held that an *agent provocateur* was not a true accomplice and, consequently, his evidence did not require corroboration, nor was there a rule of practice that juries ought not to believe them; and *R. v. Hickley* (1909) 75 J.R. 239, wherein the Court of Criminal Appeal held that a police spy or *agent provocateur* was not an accomplice and the rule of practice regarding the corroboration of the testimony of accomplices was inapplicable.

[307] *Ibid.*, at 391

[308] (1918) 31 C.C.C. 130, 47 D.L.R. 257 (Ont. H.C.); See also *R. v. Gallant* [1970] 3 C.C.C. 263 (P.E.I. C.A.) wherein the Court held that a police officer is not an accomplice requiring corroboration, but evidence in an entrapment situation should be scrutinized with care.

> the confederacy for the purpose of betrayal and that he had used considerable deceit by his own account in carrying out that intent, the jury would do well to receive his evidence with caution, seeing that it was probable on the face of it, and borne out as far as it could be by the other circumstances of the case.

However, in the subsequent decision of R. v. White,[309] the Ontario Court of Appeal held that there is no rule of general application that the evidence of a law enforcement official or his agent should be scrutinized with any greater care or suspicion because he had made false statements in the performance of his duty as an undercover agent. Mr. Justice Gillanders indicated that the testimony of such a witness,[310]

> ...should not be rejected, weakened, or placed under a shadow of suspicion and doubt by reason only of the fact that he had made such statements in the course of his duty.

It is only logical that an undercover agent must necessarily resort to falsehood in order to be accepted as someone other than a law enforcement official or agent by the individual with whom he wishes to carry on the prohibited transaction. It would be impossible to effectively operate as an undercover agent with any degree of credibility with a suspect without employing stratagems involving some degree of falsehood or deceit. To place the evidence of such a witness in a special category shadowed by suspicion and doubt would effectively emasculate the agent.

J. D. Heydon expressed the opinion that even if law enforcement officials or their agents are not to be considered accomplices that a warning should be given of a need for caution in assessing their evidence on the basis that their evidence may be distorted or otherwise unreliable as a result of their excessive zeal, the use of deceit, the trapper's poor character and record, a law enforcement officer who promotion depends upon obtaining convictions, or direct pecuniary interest.[311]

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[309] [1945] 84 C.C.C. 126, [1945] 3 D.L.R. 553, [1945] C.R. 378 (Ont. C.A.)

[310] Ibid., at 135

However, it is contended that any witness who undertakes to give testimony is placing his credibility in issue and must be carefully scrutinized. A thorough cross-examination would bring to light any of the factors mentioned by Heydon without the necessity of a warning by the court to the jury. The situation involving undercover agents, spies, and informers who are giving evidence is no different than any other witness for all testimony must be evaluated having regard to all relevant surrounding circumstances. Character, record and direct pecuniary interest are no more relevant in entrapment situations than in any other circumstances. The testimony of a law enforcement officer in an entrapment situation whose promotion depends upon his record of successful convictions cannot be differentiated from the testimony of an officer involved in an ordinary investigation for his promotion will to the same degree relate to his record of successful convictions. Not one would suggest that the officer in the latter situation should have his evidence corroborated, nor should a warning accompany his testimony.

Mr. Justice Dickson, in delivering the judgement of the Supreme Court of Canada in R. v. Vetrovec; R. v. Gaja, provided support for

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311. Supra, n. 11 at 277

this propositition. He indicated that the law of corroboration of accomplices is one of the most technical areas of the law of evidence, and is in need of reform. In evaluating the adequacy of the law in this area, he suggested that[312]

> ...the first question which must be answered is a basic one: why have a special rule for accomplices at all? Credibility of witnesses and the weight of the evidence is, in general, a matter for the trier of fact. Identification evidence, for example, is notoriously weak, and yet the trial judge is not automatically required, as a matter of law, to instruct the jury on this point. Similarly, the trial judge is not required in all cases to warn the jury with respect to testimony of other witnesses with disreputable and untrustworthy backgrounds. Why, then, should we automatically require a warning when an accomplice takes the stand?

After examining various arguments in support of a rule regarding the corroboration of the evidence of accomplices, he indicated:[313]

> None of these arguments can justify a fixed and invariable rule regarding all accomplices. All that can be established is that the testimony of some accomplices may be untrustworthy. But this can be said of many other categories of witnesses. There is nothing inherent in the evidence of an accomplice which automatically renders him untrustworthy. To construct a universal rule singling out accomplices, then, is to fasten upon this branch of the law of evidence a blind and empty formalism. Rather than attempting to pigeon-hole a witness into a category and then recite a ritualistic incantation, the trial judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness. If, in his judgement, the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. If, on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically an 'accomplice' no warning is necessary.

He concluded as follows:[314]

> The law of corroboration is unduly and unnecessarily complex and technical.
>
> I would hold that there is no special category

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312. R. v. Vetrovec; R. v. Gaja, supra, n. 301 at 615
313. Ibid., at 617
314. Ibid., at 624

> for 'accomplices'. An accomplice is to be treated like any other witness testifying at a criminal trial and the judge's conduct, if he chooses to give his opinion, is governed by the general rules.

In conclusion, a law enforcement officer, police spy, informer, decoy, undercover agent, or agent provocateur should not be considered an accomplice for the purpose of testifying by reason only of having provided an opportunity for the commission of an offence, or for soliciting the offence, or actively participating in the planning of the offence for the purpose of obtaining evidence for the prosecution of the offender. Further, the testimony of such law enforcement officials or their agents, although carefully examined by a thorough and searching cross-examination should not be evaluated or judged in a manner which differs from an ordinary witness. Although the jury should be made aware of any relevant factors brought to light by the cross-examination and its effect upon the credibility or reliability of the testimony, there should not be an automatic warning to the jury that the evidence of such witnesses is, per se, unreliable.

CHAPTER SEVEN

DETERMINATION OF ENTRAPMENT AS AN ISSUE OF LAW FOR THE JUDGE OR FACT FOR THE JURY

Chief Justice Hughes, in Sorrells v. United States, upon indicating that the defence of entrapment was available to the accused concluded that the trial judge was in error in holding that as a matter of law there was no entrapment and in failing to submit the issue to the jury.[315] However, Mr. Justice Roberts, in a seperate opinion indicated that:[316]

> The protection of its functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention....If in doubt as to the facts it may submit the issue of entrapment to a jury for advice but whatever may be the finding upon such submission the power and the duty to act remain with the court and not with the jury.

In Sherman v. United States, Chief Justice Warren, in delivering the judgement of the court rejected the view expressed by Mr. Justice Roberts in Sorrells v. United States that the factual issue of entrapment should be decided by a judge rather than a jury. He concluded that unless it can be decided as a matter of law the issue of whether an accused has been entrapped is for the jury "as part of its function of determining the guilt or innocence of the accused."[317]

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[315] Supra, n. 1 at 452
[316] Ibid., at 457
[317] Supra, n. 26 at 377

In a footnote in People v. Barraza, the California Supreme Court indicated that the determination of the existence of entrapment was a question for the jury in view of its potentially substantial effect on the issue of guilt. However, for reasons stated by Mr. Justice Traynor in People v. Moran,[318] three members of the court adopted the view that claims of entrapment should be "exclusively for the trial courts to decide subject to appropriate appellate review."[319]

Mr. Justice Frankfurter, in a seperate opinion in Sherman v. United States, concurring in the result, expressed an opposing view of whether entrapment was an issue for the judge as a question of law or for the jury as the triers of fact. Where the defence of entrapment is to be established by a determination of the predisposition of the accused, he indicated as follows:[320]

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[318] 1 Cal. 3d 755 at 765-6, 83 Cal. Rptr. 411, 463 P. 2d 763. Mr. Justice Traynor indicated as follows: "under the rationale of the Benford case, submission of the issue to the jury cannot be justified on the ground that it goes to the defendant's guilt or innocence. The crucial issue is whether the court or the jury can best achieve the purpose of the defence: the deterrence of impermissible police conduct. A jury verdict of guilty or not guilty tells the police nothing about the jury's evaluation of the police conduct. A verdict of guilty may mean that the jury did not believe the defendant's testimony that would have established entrapment. It may also mean that the jury did not believe that the conduct created a substantial risk of inducing one not ready to commit the offense into doing so. Since the defendant may assert entrapment and also deny that he committed the crime...a 'not guilty' verdict may also shed no light on the jury's assessment of police conduct. Moreover, even when the verdict settles the issue of entrapment in the particular case, it 'cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that wise administration of criminal justice demands.' In other areas involving the police conduct, we have recognized the paramount importance of committing the assessment of such conduct to the court. Thus, the trial court, subject to appropriate appellate review, determines the admissibility of confessions and other evidence claimed to have been illegally obtained."

[319] Supra, n. 234 at 956

> ...in proof of such a predisposition evidence has often been admitted to show the defendant's reputation, criminal activities and prior disposition. The danger of prejudice in such a situation, particularly if the issue of entrapment must be submitted to the jury and disposed of by a general verdict of guilty or innocent, is evident. The defendant must either forgo the claim of entrapment or run the substantial risk that in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offence of which he stands charged.

Such an objection is not valid as the defence of entrapment arises upon the accused admitting that he committed the offence but claiming that he should be relieved of criminal liability as a result of the intolerable degree of inducement or instigation by the law enforcement officials. Consequently, the evidence of bad reputation which might possibly have prejudiced the minds of the jurors to the accused in the determination of whether he actually committed the offence charged is no longer relevant as that issue has been admitted. The evidence of the accused's previous criminal record and other evidence admitted to establish a proclivity for committing the offence is, therefore, relevant only to the issue of whether he has, in fact, been entrapped, and who is in a better position to determine whether the circumstances amount to entrapment than twelve average normally law-abiding citizens.

Additionally, it is contended that such an objection is not valid as there are numerous instances in the trial process where a jury is required to assess credibility, evaluate and weigh prejudicial evidence, and restrict the application of certain evidence to particular issues based upon the instructions of the court, and the jury has thus far in these situations successfully fulfilled its function.

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[320] Supra, n. 26 at 382

Mr. Justice Stewart, in the dissenting opinion of United States v. Russell, indicated that under the objective approach where the question is whether the law enforcement officials have conducted themselves in such a way as to instigate or create a criminal offence the determination of the lawfulness of the official conduct must be made, "as it is on all questions involving the legality of law enforcement methods - by the trial judge, not the jury."[321] He further reiterated the objection voiced to the subjective approach that prejudicial evidence of predisposition, if submitted to the jury, despite instructions to the contrary, may be considered by the jury as probative of not only his predisposition but of his guilt of the charge before the court.[322] Consequently, he concluded that the determination of the issue of entrapment should be dealt with as an issue of law for the judge rather than a question of fact for the jury.

In a commentary on the Law Commission Working Paper No. 55[323] wherein doubts had been expressed as to the "appropriateness of a judge alone" determining the issue of the proper or permissible degree of inducement or involvement by a law enforcement official or his agent, it has been suggested that in view of the desirability of consistency of approach in this area the determination of the issue by the judge would have a greater likelihood of achieving this objective.[324] However, a properly instructed jury could achieve equal consistency to that of the judges.

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[321] Supra, n. 24 at 441
[322] Ibid., at 443
[323] The Law Commission, Working Paper No. 55, Codification of the Criminal Law, General Principles, Defences of General Application, (1974)

It has been suggested that both tests involve "judgement about the motivations of ordinary people, a task for which a jury has a particular claim for competence,"[325] and that, ideally, the defence of entrapment should be left to the jury. It was further indicated that any such case,[326]

> ...is likely to produce widely divergent versions of the facts - facts, moreover, which generally can be testified to only by the police officer or government agent (who may be a criminal hoping to obtain leniancy by securing the defendant's conviction) and the victim of the alleged inducement. It seems that the issue of credibility so central to such a case is better left to twelve jurors than one judge.

P. W. Williams[327] perceived the issue of whether the establishment of entrapment is a question for the determination of the judge or the jury as dependant upon whether entrapment involves the inherent power of the court to govern and protect the integrity of its processes, or whether it is to be compared to the issues surrounding the voluntariness of a statement as a question involving the admissibility of evidence. He concluded that if such is the distinction the issue of entrapment in the first instance should be decided by the court and left to the jury only where there is an issue of fact to be determined. If it is a question of the admissibility of evidence the court would determine whether the evidence should be admitted and, if admitted, the determination of the weight or credibility of such evidence should be left to the jury. He further expressed the view that, in his opinion, entrapment involves the inherent power of the courts to supervise the administration of justice and, as the courts are in a better position to dispassionately control the exercise of power by law enforcement officials then is the average citizen, the determination of the issue of the existence of entrapment in a particular instance should be left to the judge rather than the jury.

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[324] Supra, n. 40 at 21

[325] Supra, n. 176 at 1344

[326] Ibid., at 1344

[327] Supra, n. 232 at 416-7. For a further discussion of this issue see Park "The Entrapment Controversy" supra, n. 180 at 268; and Joel Shafer and William J. Sheridan "The Defence of Entrapment" (1970) 8 Osgoode Hall L.J. (No. 2) 277 at 293-4, wherein it was indicated that the more widely held opinion is that the defence of entrapment is a question of fact to be determined by the jury.

In Kirzner v. The Queen, Chief Justice Laskin discussed whether the determination of entrapment should be left to the judge or the jury. He indicated that in the subjective approach evidence of entrapment would be left to the jury to determine the predisposition of the accused to commit the offence alleged and whether there was entrapment in fact. He correctly concluded as follows:[328]

> This is consistent with Canadian practise in respect of factual issues in a trial with a jury, which is to limit the judge to a determination of whether there is evidence to go to the jury and to leave it to the jury to act on its view of the evidence once the issue is left to them.

M. L. Friedland concurred that the issue should be left to the trier of fact with the issue not going to the jury only where the judge was of the opinion that there was insufficient evidence to permit them to consider the matter.[329]

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[328] Supra, n. 7 at 498

[329] Supra, n. 12 at 25

Mr. Justice Estey, in Amato v. The Queen, indicated that entrapment in the Canadian criminal justice system in founded upon the court's inherent jurisdiction to safeguard the processes of the judicial system from abuses. He stated as follows:[330]

> The realization of an abuse of the judicial branch is a question essentially of law and political science and one not by its nature ordinarily assigned to the jury component of the trial courtroom.

It is acknowledged that an abuse of the process of the court is a question of law which is not ordinarily left to the jury. However, the determination of the existence of entrapment in the particular circumstances of a case which constitutes the abuse referred to by Mr. Justice Estey must be considered a question of fact to be determined by the jury.

These two decisions of Kirzner v. The Queen and Amato v. The Queen have clearly indicated the divergence of opinion as to whether the matter of the determination of entrapment should be left to the judge or the jury as being based upon a further difference of opinion as to the appropriate approach to be employed. Under th subjective approach the determination of guilt or innocence which has traditionally been the function of the jury would suggest that the matter should be left in their capable hands. However, if we adopt the objective approach the relevant consideration is the preservation of the integrity or purity of the courts and controlling the conduct of law enforcement officials and their agents and it has been suggested that the matter should be left to the judge within whose realm such matters have traditionally been assigned.

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[330] Supra, n. 2 at 526

Klevin has suggested that the primary focus of entrapment is the control of conduct of law enforcement officials and their agents and that the jury is relatively unaware of police practice and problems of law enforcement. Additionally, a jury verdict offers no guidance to the police, whereas a court could "develop explicit standards of permissible police conduct."[331]

However, it is possible to make a valid argument for leaving the determination of the issue to the jury under the objective approach on the basis that the "normally law-abiding person" should be determined according to general community standards. The objection voiced by Klevin suggests that the jurors are not capable of fully appreciating a matter of any degree of complexity. Yet jurors have repeatedly considered matters of far greater complexity than the problems associated with the enforcement of the law. Additionally, the determination of the facts which constitute the abuse of the court or the determination of the facts which are relied upon to establish the permissible conduct of law enforcement officials is within the realm of the jury.

However, if the remedy to be employed by the court when faced with an entrapment situation is to apply the facts constituting entrapment to the mitigation of sentence, rather than the determination of guilt or innocence, the existence of entrapment would be decided by the judge rather than the jury.

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331. Supra, n. 237 at 760-1

In conclusion, notwithstanding whether the approach adopted is subjective, objective or a combination thereof, the determination of the existence of entrapment is a question of fact which should be left for the consideration of the jury, with the exception of the instance where the remedy applied is mitigation of sentence where upon it would be left to the judge. The fact that the result of the finding of the jury may at a later stage of the proceedings be acted upon by the judge in responding to an abuse of the process of the court does not detract from the original need to have the issue of fact determined by the trier of fact.

CHAPTER EIGHT

CONSIDERATION OF THE AVAILABILITY OF EXISTING REMEDIES TO THE DOCTRINE OF ENTRAPMENT

This thesis will proceed to examine the appropriateness to a defence or doctrine of entrapment of those remedies which are available to the courts within the Canadian criminal justice system.

QUASHING OF THE INDICTMENT

In Sorrells v. United States, the minority opinion suggested that the following remedies might be available to the courts upon the establishment of entrapment:[332]

> Quite properly it may discharge the prisoner upon a writ of habeas corpus. Equally well may it quash the indictment or entertain and try a plea at bar. But its powers do not end there. Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty.

Mr. Justice Roberts indicated that the appropriate remedy in that particular case was to remand the case back to the lower court with instructions to quash the indictment and discharge the accused.[333] Similarly, in Sherman v. United States, the Court, upon establishing the existence of entrapment, directed the matter to be remanded to the lower court with instructions to dismiss the indictment against the accused.[334]

In Amato v. The Queen, Mr. Justice Estey considered whether the proper disposition upon a successful application of the defence should be to preclude prosecution, result in a finding of not guilty, or simply a stay of prosecution at whatever stage the defence is established. In reference to the American approach of quashing the indictment he indicated that there seemed to be no distinction in the law of that country, as least in this sector, between the remedies of a dismissal, quashing of the indictment or an indefinite stay of proceedings.

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[332] Supra, n. 1 at 457

[333] Ibid., at 459

[334] Supra, n. 26 at 378

He expressed the opinion that, in Canada, a dismissal of the accused on the offence charged was "inappropriate in that both essential elements of the charge, the wrongful act and the criminal intent, are present in the proof before the court."[335] He further indicated that the remedy of quashing of the indictment is not available within the Canadian criminal justice system as there "is no authority in the Criminal Code for a court in this circumstance to quash a charge that is complete in form and properly issued under the Code."[336] He concluded that the remedy which is appropriate in such a case is a stay of prosecution. The availability and appropriateness of this remedy upon a successful application of the defence of entrapment will be subsequently discussed in greater detail.

It is acknowleged that the absence of express authority in the Criminal Code to quash an indictment properly issued is not entirely determinative of the issue of whether such a remedy should be available. However, the fact that an indictment is a creation of the Criminal Code would certainly be an important consideration in whether it should be quashed without express authority. Additionally, having regard to the fact that the accused has committed both the *actus reus* and the *mens rea* of the charge alleged in the indictment, it is suggested that it would be improper to quash the indictment solely on the basis of entrapment having been established.

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[335] Supra, n. 2 at 534
[336] Ibid., at 533

ESTOPPEL

In *United States v. Lynch*,[337] it was held that the government was estopped from prosecuting the accused on the basis that the offence was induced by a law enforcement official for the purpose of obtaining evidence upon which to prosecute the accused. The following view expressed by Mr. Justice Woods in *Neuman v. United States*[338] was referred to by Chief Justice Hughes in *Sorrells v. United States*:[339]

> When the criminal design originates not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecuting therefor.

However, he challenged this principle upon both theoretical and practical grounds. He indicated that a prohibitive statute is designed to "redress a public wrong, and not a private injury" and therefore, there is no justification for holding that the government is estopped by the conduct of its law enforcement officers from prosecuting the alleged offender.

In considering the question of whether there exists any technical means by which the courts may give effect to the defence of entrapment, Glanville Williams indicated as follows:[340]

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[337] 256 Fed. 983 (1918)
[338] 299 F. 128 (1924)
[339] *Ibid.*, at 131

> The strict doctrine of estoppel has not been applied in criminal law, except in respect of estoppel by judgement; and in any event the situation is not precisely one of estoppel. In civil law the doctrine of estoppel is not allowed to be used to extend the limits of governmental power. There is no other ready-made doctrine to cover the situation.

In Canada, it has been held that the doctrine of estoppel cannot be evoked against the Crown. Nor can the acts or conduct of the Crown's servants or agents bind it by estoppel.[341] Consequently, such a remedy would not appear to be available within the Canadian criminal justice system for the doctrine of entrapment.

It is contended that the civil law doctrine of estoppel should not be extended to the criminal law doctrine or defence of entrapment as a means of controlling the conduct of law enforcement officials or their agents. The situation constituting entrapment is not precisely one of estoppel, which provides that one's own act or acceptance prevents or precludes him from alleging or pleading the truth.[342] Additionally, the entrapped individual should not be permitted to plead estoppel as a result of the government agents' activity in inducing the commission of the offence when the accused intentionally and voluntarily committed the prohibited criminal act. Such intentional conduct on the part of the accused should serve to nullify any plea of estoppel.

ACQUITTAL

In R. v. MacDonald[343] and R. v. Haukness,[344] the Provincial

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[340] Glanville Williams, The Criminal Law, The General Part, (1961) at 785

[341] 12 C.E.D. (West. 3rd). See also Bank of Montreal v. The Queen (1907) 38 S.C.R. 258; Boulay v. The Queen (1910) 43 S.C.R. 61; and Humphrey v. The Queen (1892) 20 S.C.R. 591

[342] Williams v. Edwards 163 Okl. 246, 22 P. 2d 1026

[343] (1971) 15 C.R.N.S. 122 (B.C. Prov. Ct.)

[344] [1976] 5 W.W.R. 420 (B.C. Prov. Ct.)

Court of British Columbia, upon determining that the facts were sufficient to constitute entrapment, ordered that the accused be acquitted. However it would appear that this remedy is not appropriate in an entrapment situation where all of the constituent elements of an offence have been committed by the accused. As Lord Fraser indicated in R. v. Sang, the arguments upon which an acquittal is proposed cannot logically be supported. He stated as follows:[345]

> The assertion by an accused person that he has been induced by some other person to commit a crime necessarily involves admitting that he has in fact committed the crime. Ex hypothesi he must have done the necessary act and have done it intentionally in response to the inducement. All the elements, factual and mental, of guilt are thus present and no finding other than guilty would logically be possible.

The position of the Law Commission on this issue was stated in the following terms:[346]

> We question whether non-conviction as a result of invoking a defence would be substantially more effective for this purpose. It must be remembered, even assuming a defence could be drafted with precision, the occasions upon which it could be called in aid successfully would in all likelihood be very few. Like duress it would be an 'all or nothing' defence involving an admission of guilt subject to the defence. In the context of the continual struggle against crime in which the police are engaged, we doubt whether this small number of cases would act as a check upon any undesirable conduct.

Mr. Justice Estey, in Amato v. The Queen, properly indicated that a dismissal of the accused on a charge where both essential elements, the wrongful act and the criminal intent, are present in the evidence before the court would be inappropriate.[347]

If the fundamental purpose of a doctrine or defence of entrapment is the control of undesirable conduct on the part of the law enforcement officers and their agents, preserving the integrity of the courts and maintaining public confidence in the criminal justice system, then one must look to techniques or remedies capable of obtaining these objectives. It is contended that acquitting an admittedly guilty individual who has acknowledged that he had voluntarily and intentionally committed a criminal act would neither achieve these objectives nor would it be proper in the circumstances. Consequently, the remedy of acquitting an accused when the defence of entrapment has been successfully maintained is inappropriate in the Canadian criminal justice system.

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[345] Supra, n. 32 at 1238
[346] Supra, n. 43 at 48
[347] Supra, n. 2 at 533

EXCLUSION OF EVIDENCE

It has been suggested that the "only truly effective method of controlling police behaviour is to refuse the police the use of all and any evidence improperly obtained."[348] In Kirzner v. The Queen, Chief Justice Laskin indicated that the courts in the United States have attempted to control the activity of their law enforcement officers on a constitutional basis, by excluding illegally obtained evidence, whereas in England and New Zealand the courts have exercised a discretionary power to control the admissibility of evidence that would operate unfairly against an accused.[349]

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[348] Supra, n. 53 at 190

[349] Supra, n. 7 at 492. For a thorough analysis of the discretionary power of the courts to exclude evidence, based upon an examination of the Canadian, American and Commonwealth authorities, see A. Anne McLellan and Bruce P. Elman "The Enforcement of The Canadian Charter of Rights and Freedoms: An Analysis of Section 24" (1983) 21 Alta L. Rev. 205 at 225-237.

The Law Commission indicated that the courts in England, acting on the assumption that the discretion to exclude admissible evidence is relevant to entrapment, have "achieved the same practical result as might be obtained by a substantive defence of entrapment." It is well established that the courts in England have a discretion, in certain circumstances, to exclude admissible evidence.[350] However, this discretion to exclude admissible evidence related to evidence which has been obtained subsequent to the commission of the offence, and it was "the mode of obtaining or the consequence of admitting this evidence which are judged to be unfair or unduly prejudicial," whereas in cases alleging entrapment the conduct which is being questioned occurred prior to and "indeed is the cause of the commission of the offence."[351]

In R. v. Foulder, Foulkes and Johns,[352] the accused were charged with offences alleging possession of a narcotic. The court ruled that the police having incited the accused to obtain the drugs resulted in their evidence being excluded which, consequently, resulted in an acquittal. In R. v. Burnett and Lee,[353] the accused were charged with conspiracy to utter forged bank notes. It was established that a police informer had tempted and encouraged the accused to commit the offence. The court held that the case should be withdrawn from the jury on the general grounds of unfairness.

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[350] Supra, n. 43 at 35
[351] Supra, n. 43 at 36
[352] [1973] Crim. L.R. 45 (Inner London Quarter Sessions)
[353] [1973] Crim. L.R. 748 at 749

However, in a subsequent decision of R. v. McEvelly and Lee,[354] the law enforcement officials represented their willingness to purchase stolen spirits. Subsequently spirits were stolen and received by the accused who was charged accordingly. The Court of Appeal held that the evidence of the officer was properly admitted and, further, that the evidence in the two previously mentioned cases was admissible and, consequently, should have been considered by the court. The Court of Appeal further indicated as follows:[355]

> ...the mere fact that there was only a possibility that the offence, as it was ultimately committed, might not have taken place but for the intervention of the police was not, of itself, a ground for a judge exercising his discretion to exclude evidence.

In R. v. Mealey and Sheridan,[356] the accused were convicted of conspiracy to commit robbery as the result of information obtained from an informer. The Court of Appeal accepted that the informer had acted as an agent provocateur, and that the courts have a "wide discretion to exclude evidence unfairly obtained."[357] However, the court concluded as follows:[358]

> ...the present application has nothing to do with evidence unfairly obtained.

The conclusion arrived at by the Law Commission was that clearly a defence of entrapment does not exist in the law of England. They further concluded as follows:[359]

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354. [1974] Crim. L.R. 239 (C.A.)
355. Ibid., at 241
356. (1974) 60 Cr. App. R. 59 (C.A.)
357. Ibid., at 63
358. Ibid., at 64
359. Supra, n. 43 at 41

> It is less clear to what extent there is a discretion in the courts, by exclusion of evidence, to bring about the same result as a general defence of entrapment would achieve. But we think that this lack of clarity is due to a failure to distinguish between causing, by incitement and encouragement the commission of an offence which would not otherwise have been committed, and obtaining evidence unfairly of an offence which has already been committed. It is evident that the first does not provide a defence; the second, despite the attempts to use the discretion, is not, we think, relevant in cases of entrapment such as we are here considering....If this view of the law is correct, the courts cannot, by ruling either as to the substantial merits or as to the admission of evidence, exercise that indirect control of police activities which have been thought desirable in other jurisdictions.

In considering the adequacy of a discretion to exclude admissible evidence in cases of entrapment as a means of controlling instigation of offences by law enforcement officers, the Law Commission expressed the opinion that such a discretion is not an appropriate means of controlling entrapment. Such a discretion appears to relate to the mode of obtaining, or consequence of admitting, the evidence adjudged to be unfair or unduly prejudicial.[360] However, in entrapment cases the accused is not alleging that the evidence was unfairly obtained but rather that a conviction would be unfair as it would not have occurred but for the involvement of a government law enforcement official. The Law Commission concluded as follows:[361]

> In our view, extenuation of a discretionary power relating to admission of evidence to the case where what is really an issue is whether it is 'fair' that the proceedings should have been instituted at all is wholly illogical, and, indeed, raises issues going far beyond the merely evidential.

Two factors indicated by the Law Commission weighing heavily against a reliance upon a discretion to exclude admissible evidence in entrapment cases are, firstly, the discretionary nature of the power itself which would require many years before adequate guidelines could be established and, secondly, that reliance upon a discretion of this sort might produce inconsistent results depending upon what other evidence there was of the offence. The Law Commission expressed the following view on these points:[362]

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[360] Ibid., at 44
[361] Ibid., at 45

> Where there is independent evidence of the commission of the offence, not related to the entrapment itself, that evidence might not be subjected to exclusion; and where the evidence is gained through the ready confession of the defendant, again that evidence might not be excluded. It might, therefore, be that the discretion could operate to benefit those fortunate enough not to have to face such independent evidence of their offence or those sufficiently hardened to resist attempts to persuade them to make an inculpatory statement. One conclusion is that the discretion to exclude admissible evidence offers no assistance in the context of the control and prevention of entrapment.

In R. v. Sang, the House of Lords agreed that a power to exclude otherwise admissible evidence relating to the commission of an offence which had been instigated by a law enforcement official or his agent would constitute an indirect recognition of the defence of entrapment, which had been expressly rejected. Lord Salmon stated as follows:[363]

> A man who intends to commit a crime and actually commits it, is guilty of the offence whether or not he has been persuaded or induced to commit it, no matter by whom. This being the law, it is inconceivable that, in such circumstances, the judge could have a discretion to prevent the Crown from adducing evidence of the accused's guilt, for this would amount to giving the judge the power of changing or disregarding the law.

It is acknowledged that his Lordship's opinion was based upon a previous rejection of the defence of entrapment in England. However, it is contended that the comments are equally applicable to the Canadian criminal justice system as a person who commits both the actus reus and the mens rea is guilty of the offence, subject to any defence which he may raise. A trial judge should not, therefore, have a discretion to exclude otherwise admissible evidence as a result of entrapment.

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[362] Ibid., at 45

[363] Supra, n. 32 at 1235-6

Lord Diplock indicated that the discretion to exclude admissible evidence does not extend to evidence of a crime which has been instigated by a law enforcement official solely as a result of the instigation. He further expressed a desire to avoid "a claim to a judicial discretion to acquit an accused of any offences in connection with which the conduct of the police incurs the disapproval of the judge."[364]

However, Lord Fraser expressed a different view when he indicated as follows:[365]

> The result will be to leave judges with a discretion to be exercised in accordance with their individual views of what is unfair or oppressive or morally reprehensible... But I do not think there is any cause for anxiety in that Judges of all Courts are accustomed to deciding what is reasonable and to applying other standards containing a large subjective element...I do not think it would be practicable to attempt to lay down any more precise rules because the purpose of the discretion is that it should be sufficiently wide and flexible to be capable of being exercised in a variety of circumstances that may occur from time to time but which cannot be foreseen.

The observation by Lord Fraser that there is little reason for concern that there will be inconsistent application of the discretionary exclusion of evidence loses strength when one considers the wide divergence of opinion within the Canadian criminal justice system as to

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364. Ibid., at 1227
365. Ibid., at 1241-2

what constitutes undesirable conduct on the part of law enforcement officials amounting to entrapment. This divergence of opinion is exemplified by the split among the members of the Supreme Court of Canada in Amato v. The Queen as to whether the conduct of the officer and his agent constitutes entrapment, assuming it to exist in law in Canada. Certainly such indecision or variation of opinion will translate into a inconsistent and inequitable administration and application of the criminal law.

It has been suggested that at the heart of the decision of R. v. Sang lies the belief that the "rules of evidence are an inappropriate and ineffective means by which to control police behaviour."[366] It has further been suggested that the corollary of such an assumption is that alternative techniques such as increased police disciplinary action, improved police training, and responsive tortious remedies will have to be employed in order to obtain the desired objective of controlling undesirable behaviour of law enforcement officials. Although it has been acknowledged that "the present efficacy of these alternatives is questionable" it was further indicated that the problem "lies not so much in their suitability but in their application and performance."[367]

It has been suggested that R. v. Sang reaffirms the foundation of English case law upon which the Supreme Court of Canada decision of

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[366] Allan C. Hutchinson and Neil R. Withington "Criminal Law - Evidence - Defence of Entrapment - Discretion to Exclude Evidence" (1980) 58 C.B.R. 376 at 388. For further discussion see Wilkey "The Exclusionary Rule: Why Suppress Valid Evidence" (1978) 5 Judicature 214.

[367] Ibid., at 389

R. v. Wray[368] was established and, further, that,[369]

> ...there can be no doubt that the opinions of their Lordships are intended to redirect our energies for controlling police behaviour away from possible substantive defences and exclusionary rules of evidence towards alternative solutions.

The position of the courts in South Australia was indicated by Mr. Justice Chamberlain, in the decision of R. v. Wright, which he expressed in the following terms:[370]

> The purpose of the criminal trial is to try the guilt or otherwise of the defendant, not to investigate the conduct of the police, except of course in so far as it effects the admissibility of evidence. It is not, in my view, correct to say that the policy of this branch of the law of evidence is designed to repress improper police practices; that is a matter for those in control of the police force.

A different position was taken by the courts of New Zealand as indicated in R. v. Pethig,[371] wherein Mr. Justice Mahon, for the Supreme Court of Aukland, quoting from R. V. O'Shannessy,[372] stated as follows:[373]

> But in New Zealand we have always approached the application of public policy (for that is what it is...) by leaving it to the discretion of the trial judge to exclude the evidence to be given by the police officer if he thinks the conduct of that officer falls on the wrong side of the line. This court has been most anxious not to restrict this discretion reposing in the trial judge. Indeed the well known residual discretion to exclude evidence on this and on other grounds has always received support and encouragement here. We have thought it preferable to deal with questions touching the acceptance or rejection of such evidence on the basis of discretion rather than to lay down rigid dilineations of areas of admission or exclusion.

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[368] [1971] S.C.R. 272 (S.C.C.)
[369] Supra, n. 366 at 390
[370] [1969] S.A.S.R. 256 at 271
[371] [1977] 1 N.Z.L.R. 448
[372] Unreported - Wellington - 8 October 1973 (C.A.)
[373] Supra, n. 371 at 451

After indicating that the courts in New Zealand have recognized a distinction between police conduct directed at facilitating further offences by a known offender and police conduct which actually creates crime, Mr. Justice Mahon commented as follows:[374]

> The New Zealand approach to the problem represents a selection by the Court of appeal of one of two competing views in relation to evidence obtained by a police officer who has instigated an offence which would not have been committed. The other view...is that probative evidence cannot be excluded and that the nature of the police evidence and the manner in which it was obtained is relevant only to the question of penalty....But on the first stated view, now prevailing in this country, the act of the police in discharging their constitutional duty of laying an information may be nullified by a ruling that the unequivocal evidence of guilt is inadmissible. The conceptual difficulty in harmonizing these factors in apparent. In practical terms the police are obliged to make an arrest on evidence which will be held not admissible in the court where the offender will be tried and as a matter of public policy the offender will be discharged despite the existence of evidence which shows that he yielded through weakness, folly or mercenary gain to an invitation to commit a premeditated crime.

Mr Justice Mahon further suggested that in these times of organized crime an argument may be made for more stringent measures designed for the protection of society from offenders who would permit themselves to commit offences not otherwise contemplated, "their reason for acquiescence being no different from the motivations which normally inspires the commission of crime in general." However, he concluded that he must apply the first approach and determine whether he should exclude the evidence.[375]

N. L. A. Barlow suggested that a difficulty with the New Zealand approach of excluding evidence is that the accused is at the mercy of a discretion and, consequently, there is no certainty the evidence would be excluded. This gives rise to inconsistent results which prove confusing to the law enforcement officials and appear unfair to an accused.[376]

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[374] Ibid., at 451-2
[375] Ibid., at 452

In Canada the fundamental principle of admissibility is that all the facts which are logically probative are admissible into evidence unless excluded by a specific exclusionary rule of evidence. This rule has been interpreted as follows:[377]

> ...all facts and circumstances which afford a fair presumption or inference as to the question in dispute, and which may fairly and reasonably aid the jury in arriving at the true conclusion, are admissible, and the true principle is to extend rather than restrict the admissibility of evidence.

There is authority that evidence, although admissible on the strict application of the principle, may be excluded if the court is of the opinion that it is of little probative value and is prejudicial to the accused. Consequently, the court has a discretion which they may exercise to exclude the evidence. This proposition has been limited by the Supreme Court of Canada in R. v. Wray. Mr. Justice Martland stated as follows:[378]

> The exercise of a discretion by a trial judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the court of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue as before the court is trifling, which can be said to operate unfairly.

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[376] Supra, n. 58 at 331

[377] Sheen v. Bumpstead (1862) 1 H. & C. 358 at 367; cited in Clark v. Stevenson (1865) 24 U.C.Q.B. 200 at 208 (C.A.); and in Re Nat Trust v. C.P.R. (1913) 29 O.L.R. 462 at 470

[378] Supra, n. 138 at 293

In R. v. Wray, the majority decision indicated a clear distinction between unfairness in obtaining evidence and the use to which it is ultimately put in the trial process. The decision indicated the trial judge's duty to ensure a fair trial for the accused and to admit all logically probative evidence.

The effect of Mr. Justice Martland's decision in R. v. Wray is that a trial judge is not to look beyond the parameters of the trial process in exercising his discretion to exclude evidence. As A. F. Sheppard indicated, the Supreme Court of Canada has divided the criminal justice process into two parts; the pre-trial part, including investigation and interrogation, and the trial itself, indicating that the discretion to exclude evidence because of the method by which it was obtained in the pre-trial procedure was not available.[379]

It has been suggested that any possibility of excluding admissible evidence as a means of dealing with entrapment situations would appear to have been completely ruled out by the Supreme Court of Canada in R. v. Wray. It has further been stated as follows:[380]

> While this discretion may not go so far as abolishing (or declaring the non-existence of) a discretion to exclude technically admissible evidence on the ground that its prejudicial effect at the trial would clearly outweigh its probative value, it is made abundantly clear in the majority judgements of Martland and Judson, J.J., that the methods by which evidence was obtained is totally irrelevant in deciding whether that evidence should be received by a court, once the initial question of the admissibility of the evidence is settled. In short, the majority in Wray see no role for the courts in policing the police outside the traditional roles relating to the admissibility of confessions.

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[379] A. F. Sheppard "Restricting the Discretion to Exclude Admissible Evidence: An Examination of Regina v. Wray" (1971-2) 14 C.L.Q. 334 at 336

[380] Supra, n. 53 at 185-6

The decision of the Supreme Court in R. v. Wray has received considerable criticism with the main thrust being as follows:[381]

> ...by taking such a stance, the court had shown scant regard for individual rights and had provided no discentive to the police to refrain from objectionable tactics and practices in the obtaining of evidence.

Such objections which consider the objective of a doctrine of entrapment as discouraging the law enforcement officers from employing undesirable tactics and practices in obtaining evidence upon which to prosecute the accused fails to consider whether the exclusion of evidence and the consequent acquittal of the accused serve as a sufficient "discentive" to the police to refrain from objectionable tactics. It is suggested that acquitting an accused, the necessary result of the exclusion of evidence in most instances, would not have the desired effect of deterring the undesirable conduct of the law enforcement officials.

It has been suggested that the judgement of Mr. Justice Martland, in R. v. Wray, can be interpreted "as denying the very existence of a judicial discretion to exclude relevant evidence" and is a denial of an exclusionary rule per se "since evidence which is not relevant is inadmissible anyways."[382] However, the judgement supports a discretion to exclude evidence which is marginally relevant, and therefore admissible, although of little probative value.

The discretion to exclude evidence as defined by the Supreme Court of Canada in R. v. Wray is even narrower than the discretion suggested by the English authoritites as "unfairness" in obtaining evidence is limited to evidence gravely prejudicial to the accused and of little probative value. It has been indicated as follows:[383]

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[381] Supra, n. 366 at 381
[382] M. S. Wineberg "The Judicial Discretion to Exclude Relevant Evidence" (1975) 21 McGill L.J. 1 at 6

> The majority reasoning in Wray has the merit of tidying up some of the sloppiness of language characteristic of the discussion of the subject.

However, it was further stated:[384]

> The narrow view of Kuruma taken in Wray seems unsatisfactory if for no other reason than that illegally obtained evidence my be unreliable in ways that the courts have not always realized.

The majority decision in R. v. Wray supports the proposition that a trial judge has no discretion to exclude otherwise admissible evidence because he is of the opinion that it would be calculated to bring the administration of justice into disrepute. The discretion of the trial judge to exclude admissible evidence does not extend beyond his duty to ensure that the minds of the jurors will not be prejudiced by evidence of little probative value but of great prejudicial effect. Upon the basis of this interpretation it would be impossible to conclude that evidence of law enforcement officials going to the issue of the guilt or innocence of an accused would be of little probative value and, consequently, it should not be excluded.

It has been recognized that "potentially strong repercussions" which the sanctioning of a wide exclusionary discretion would have upon the criminal justice system are as follows:[385]

> Apart from the obvious danger of the capricious exercise of

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[383] J. D. Heydon "Illegally Obtained Evidence" [1973] Crim. L. R. 603 at 606

[384] Ibid., at 607

[385] Supra, n. 366 at 387

> such discretion with the likelihood be subverting existing rules of law, there is also the possibility that there would occur an ultimate shift in the regime adopted to control the admissibility of evidence, in general and illegally obtained evidence, in particular. It is but a short step from admitting the existence of a wide exclusionary discretion based on fairness to a scenario in which the admissibility of evidence depends not upon the Kurma test but upon a subjective judicial test of fairness..

The subversion of existing rules of evidence to which reference was made is found in the decision of R. v. Sang, wherein the discretionary power to exclude evidence had been employed to circumvent the existing law and permit a defence of entrapment, in fact if not in name.

The uncertainty or inconsistency in the interpretation and application of the criminal law which would in all likelihood result from the exercise of such a discretionary power to exclude otherwise admissible evidence has been expressed as follows:[386]

> ...a wide exclusionary discretion would remove questions of admissibility from the relative certainty of established substantive rules and expose them to an ill-defined judicial discretion....Furthermore, it can be argued that the protection of individual rights is much better served by a well-ordered legal system than being left to the unsafe and uncertain dictates of judicial discretion. It is by no means certain that all judges would adopt principles acceptable to the guardians of individual liberty and could not be guaranteed to exercise that discretion for the benefit of those most in need of its assistance.

This opinion would appear to have validity as the various courts within Canada and, indeed, members within those very courts, are unable to agree as to that which constitutes entrapment. This is evidenced by the split in the Supreme Court of Canada in Amato v. The Queen, wherein members of the Court differed as to whether or not entrapment existed on the particular facts of the case. Such indecision affords scant guidance to the lower courts as to the proper exercise of their discretion. Consequently, these divergent views will result in an inconsistent and inequitable interpretation and application of the criminal law which will only serve to confuse the law enforcement officials as to the limits of permissible activity, and leave the accused with a sense of unfairness or injustice from the manner with which he has been dealt with by the courts.

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[386] Ibid., at 387-8

A most serious objection to the exercise of a discretionary power to exclude evidence in which the circumstances are perceived to constitute entrapment is the contention that such a remedy, although providing relief to the accused in some instances, would not serve its other objective of deterring the undesirable conduct of the law enforcement officials.

In support of this contention two convincing arguments have been suggested. The first is based upon a series of empirical studies in the United States following the American Supreme Court's introduction of a rigorous regime of procedural safeguards designed to protect individual rights and to discourage undesirable practices by law enforcement officials. These studies revealed that such rules had little impact on the conduct of law enforcement officials in their dealings with an accused and, secondly, that in certain instances actually encouraged the further misconduct of perjury by the law enforcement officials.[387]

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387. Ibid., at 388

A. F. Sheppard also examined the value of an exclusionary rule of evidence as a means of controlling official behaviour, and referred to the argument that such a technique improves the conduct of law enforcement officials from two aspects which he described as follows:[388]

> ...in the short run, exclusion deters the police from improper conduct and in the long run by the 'moral and educative force of the law,' it encourages higher standards of conduct.

However, he perceived a possible argument against the acceptance of a wide discretionary power to exclude evidence as a means of controlling official conduct as such a discretion involves the "suppression of truth in the search for truth."[389] He further referred to the previously mentioned statistical studies, dealing with the effectiveness of excluding evidence as a technique for controlling official conduct as not establishing any positive effect in controlling the behaviour of the law enforcement officials and actually encouraging their perjury, and concluded as follows:[390]

> Thus the assumption made by some Canadian judges, that exclusion of illegally obtained evidence effectively controls police conduct may not be justified.

Park also indicated that there is substantial evidence that the exclusionary rule relating to search and seizure is being defeated to a

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388. Supra, n. 379 at 348
389. Ibid., at 346, quoting from Burger "Who Will Watch the Watchman" (1964) 14 Am. U. L. Rev. 1 at 23, subsequently Chief Justice of the United States Supreme Court.
390. Ibid., at 348. See also Richard J. Medalie et al "Custodial Police Interrogation in our Nation's Capital: The Attempt to Implement Miranda" (1967-8) 66 Mich. L. Rev. 1347; Richard Seeburger "Miranda in Pittsburgh - A Statistical Study" (1967-8) 29 U. of Pitts. L. Rev. 1; M. Wald "Interrogations in New Haven: The Impact of Miranda" 67 Yale L. J. 1519; D. H. Oaks "Studying the Exclusionary Rule In Search and Seizure" (1969-70) 37 U. of Chi. L. Rev. 665; Comment "Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases" (1968) 4 Colum. J. L. & Soc. Prob. 87.

partial degree by the perjury of law enforcement officials, and concluded that such a problem "will be doubly or triply present in entrapment cases."[391]

Such an observation is valid having regard to the fact that law enforcement agencies often employ informers or other agents who are often themselves criminals or of doubtful persuasion and who have been offered immunity from prosecution or pecuniary gain for services rendered.

In rejecting the discretionary exclusion of evidence as a method of controlling official behaviour, Chief Justice Burger, in a dissenting opinion in Bivens v. Six Unknown Named Agents,[392] indicated his displeasure with this technique in the following manner:[393]

> Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society - the release of countless guilty criminals....But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials.

The evidence from the inconclusive empirical studies, if anything, is to the contrary that the exclusionary rule has little or no effect as a deterrent to official misconduct and, in fact, may even be encouraging another form of undesirable behaviour on the part of law enforcement officials, namely, perjury. It is suggested that if, in fact, such perjury occurs it is not related to the substance of the offence but, rather, to the investigative procedure employed.

J. D. Heydon suggested that an argument which is often raised in favour of the English position over that of the United States is that the latter, in sacrificing reliable evidence in an attempt to dissuade law enforcement officials from undesireable conduct, favours "only the guilty" which causes "two wrongs to occur instead on only one." He further stated that it is argued as follows:[394]

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[391] Supra, n. 180 at 233
[392] 403 U.S. 388 (1971)
[393] Ibid., at 416

> The sole purpose of such a trial is to discover the truth and make a correct finding as to the accused's guilt or innocence. It is not a game in which the prosecutor's hands are to be tied so that it can only act "fairly." The impropriety of the police conduct in no way disables the court from giving a fair and impartial judgement. The wrongdoing policeman should not be punished by exclusion of the evidence, which injures only the public at large and not the policeman, but by other remedies.

However, he further expressed the opinion that such an argument is vulnerable as it is not necessarily true that the exclusionary rule protects only the guilty as its deterrent effect "ensures that in future both guilty and innocent persons will be protected form illegal investigation."[395] Such an opinion, or course, assumes that the exclusionary rule will, in fact, have the required effect of deterring illegal investigation. Such has not been established and, if anything, statistical studies are to the contrary. Consequently, the public at large suffers for the wrongdoing of the police officer while the officer himself remains unpunished.

As Chief Justice Burger suggested, it is speculative as best that such a rule has any deterrent effect on the law enforcement officer's conduct which would indicate that the rejection of the previous argument by J. D. Heydon is illfounded. As was previously mentioned,

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394. Supra, n. 383 at 692
395. Ibid., at 692

the empirical studies deny that such a technique acutally increases a form of official misconduct. It was concluded by M. L. Friedland that, even if the courts were given a discretion to exclude evidence,[396]

> ...it would not be a sound technique for controlling entrapment. Entrapment does not lead to the creation of evidence in the same way as illegal search and interrogation do. What is to be excluded? Presumably it is the evidence of the undercover agents. So an accused who happens to admit the facts to the police will be convicted, but one who does not will not. Similarly, if another witness happens to be present the accused will be convicted; if the entrapper and the accused are alone he will not be. These distinctions are surely unwarranted. The entrapment should either directly affect the result or it should not.

It has been properly concluded as follows:[397]

> It is a strange logic that in seeking to support and dispense justice, attention is focused not in bringing to account the policeman who acted improperly, but in setting free a person who committed some criminal act; 'the criminal is to go free because the constable has blundered.' In short, the rationale for an exclusionary discretion is built on that spurious contention that two wrongs make a right. The control of the police must result in the protection of society and not the release of criminals.

This opinion presumes that there are other more effective methods for controlling police conduct. Such methods and techniques will subsequently be discussed in greater detail.

In conclusion, the discretion to exclude relevant evidence, although available to a limited degree within the Canadian criminal justice system, is considered to be an inappropriate remedy for obtaining the objectives of a defence or doctrine of entrapment. An exclusionary rule of evidence in this area, rather than protecting society, allows the admitted criminal and the offending law enforcement officer to go unpunished. Consequently, other, more effective means must be established in order to most effectively achieve all the objectives of the doctrine of entrapment.

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[396] Supra, n. 12 at 22-3

[397] Supra, n. 366 at 388-9. The quotation referred to in this passage is by Cardoza, J., in People v. DeForce 242 N.Y. 13 at 23-4 (1926)

STAY OF PROCEEDINGS

It becomes necessary to determine whether the courts in Canada have the authority to forbid the prosecution of an individual who fall squarely within the ambit of the provisions of the statute creating the prohibited act and, consequently, order a stay of proceedings, as was done by the Ontario County Court in R. v. Shipley,[398] when the evidence establishes entrapment.

This issue was raised by Mr. Justice Laskin in R. v. Ormerod, but remained unresolved when he stated as follows:[399]

> I do not, of course, say that these would be the findings if the evidence was evaluated against the background of a principle of an overriding judicial discretion to stay a prosecution because of police complicity in the events which led to it. Nor do I say that such a principle must be recognized. It may, however, be arguable that it should be, but I leave consideration thereof to an occasion when it is squarely raised.

In R. v. Osborn, the Supreme Court of Canada considered an appeal from a decision of the Ontario Court of Appeal which had directed a verdict of acquittal to be entered on the basis that the trial judge had failed to exercise his discretion by staying a second indictment arising from the same facts and circumstances as an earlier indictment. The basis of the Court of Appeal's decision was that the relaying of a new information was, in the circumstances, so oppressive as to constitute an abuse of the process of the court. Mr. Justice Pigeon, in delivering the judgement of the Supreme Court, indicated that there does not exist in criminal law a rule that in the case of multiplicity of charges successively made on the same facts a trial judge has a discretion to stay an indictment because he considers it an injustice amounting to oppression. He concluded as follows:[400]

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[398] Supra, n. 112
[399] Supra, n. 113 at 20

> I can see no legal basis for holding that criminal remedies are subject to the rule that they are to be refused whenever, in its discretion, a court considers the prosecution oppressive.

It has been suggested that Mr. Justice Pigeon's remarks,[401]

> ...are addressed solely to the matter of preliminary pleas and do not extend beyond that stage to the point of considering whether or not substantive defences involving a notion of abuse of process are possessed of legal validity.

However, he concluded that in essence the proposition which Mr. Justice Pigeon was ennunciating is as follows:[402]

> ...the courts do not possess the power to stay proceedings simply because they are considered to be oppressive.

Chief Justice Laskin, in delivering the minority opinion of the Supreme Court of Canada in Rourke v. The Queen, considered whether there exists in Canadian criminal law a principle of abuse of process which a trial judge may invoke to stay proceedings against an accused on a criminal charge. He concluded that every court having criminal jurisdiction is entitled in the same manner as are the civil courts to protect its processes from abuse. He further concluded that

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400. Supra, n. 115 at 190
401. Stanley Cohen "Abuse of Process: The Aftermath of Rourke" 39 C.R.N.S. 349 at 356
402. Ibid., at 356

a court has the power to stay proceedings which are considered oppressive and vexatious and thereby constituting an abuse of process.[403]

Mr. Justice Pigeon, upon considering whether a court in criminal proceedings has a discretion to stay those proceedings which are considered to be an abuse of the process of the court, indicated in the majority judgement as follows:[404]

> I cannot find any rule in our criminal law that prosecutions must be instituted promptly and ought not be permitted to be proceeded with if a delay in instituting them may have caused prejudice to the accused. In fact, no authority was cited to establish the existence of such a principle which is at variance with the rule that criminal offences generally are not subject to proscription except in the case of specific offences for which a proscription time has been established by statute. I have to disagree with the view expressed by McIntyre, J.A., that there could be factual situations giving to a trial judge discretion to stay proceedings for delay.

Once the information has been sworn, and the charge has been brought within the process of the court, the court would then have authority to deal with the accused as was deemed appropriate when it perceives oppression constituting an abuse of its processes. However, when that which is alleged to be oppressive or an abuse occurs in the investigative stage, prior to entering the process of the court, such as the decision by the officer as to the proper time to lay an information, the matter does not fall within the process of the court and, consequently, the court has no authority to stay the proceeding. In order to stay a proceeding for an abuse of the process of the court the court's processes must have been abused. Such a position applies to an entrapment situation where the alleged oppression or abuse occurs outside the processes of the court.

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[403] Supra, n. 128 at 1040
[404] Ibid., at 1043

Mr. Justice Pigeon continued by stating that he could not admit to any general discretionary power in courts of criminal jurisdiction to direct a stay of proceedings regularly instituted because they were of the opinion that the prosecution was oppressive.[405] He further indicated that the absence in the Criminal Code of a provision contemplating the staying of a proceeding by a trial judge, or an appeal from such decision, and a specific reference to a power to stay proceedings by the Attorney-General, "is a strong indication against the existence of any power to grant such stay."[406]

He further suggested that the correct view is that stated by Viscount Dilhorne in Director of Public Prosecutions v. Humphreys wherein his Lordship indicated that a judge must keep out of the arena and not have, or appear to have, any responsibility for the institution of a prosecution as it would tend to blur the distinction between the prosecutor and the judge. His Lordship concluded as follows:[407]

> If there is the power which my noble and learned friends think there is to stop a prosecution on indictment in limine it is in my view a power that should be exercised in the most exceptional circumstances.

It has been suggested that interpreting the majority judgement of Rourke v. The Queen at its widest,[408]

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[405] Ibid., at 1043
[406] Ibid., at 1045
[407] Supra, n. 133 at 510
[408] Supra, n. 401 at 350-1

> ...the doctrine of abuse of process is not available to be invoked by way of preliminary plea in order to have a proceeding stayed in at least the following situation...as an adjunct to the defence of entrapment....

In R. v. Bjorklund, Mr. Justice Berger, in obiter dicta, interpreted the decision of Mr. Justice Pigeon in Rourke v. The Queen, in the following manner:[409]

> It may be that the judgement of the Supreme Court of Canada in the Rourke case...has ended the exercise by judges in Canada of their power to stay criminal proceedings which constitute an abuse of process, or it may be that the judgement of Mr. Justice Pigeon, speaking for the majority will be treated as obiter (as I respectfully suggest it ought to be), and that the application of the Supreme Court's decision in the Rourke case will be limited to cases where it is sought to stay criminal proceedings, on the ground of excessive delay in lodging them.

On the basis of the views expressed by Viscount Dilhorne in Director of Public Prosecutions v. Humphreys and those expressed by Mr. Justice Berger in R. v. Bjorklund, the judgement of Mr. Justice Pigeon has been interpreted in the following manner:[410]

> It is submitted that the courts should view the Rourke case as having decided, firstly, that a criminal court may not stay proceedings for an abuse of process where there has been delays and, secondly, that if criminal courts have an inherent jurisdiction to stay abuse of proceedings, that it is a power which should only be exercised in the most exceptional circumstances.

In Amato v. The Queen, Mr. Justice Estey considered the question of whether there now exists any jurisdiction in a criminal court, following the decisions in R. v. Osborn and Rourke v. The Queen, to say a prosecution on the basis of its constituting an abuse of process.

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[409] Unreported, 8 August 1977, C.C. 770436, (B.C. S.C.) at 4

[410] R. W. Jacobs "Criminal Law - Abuse of Process - Oppressive Delay - Jurisdiction of Inferior Courts To Stay Proceedings - Rourke v. The Queen" 12 U.B.C. L. Rev. 127 at 130-1

He interpreted R. v. Osborn as establishing only that the doctrine of "abuse of prosecution" will not avail an accused in the case of multiple charges arising from the same circumstances. He confined the decision in Rourke v. The Queen to the question of whether an abuse of process resulted from initiating a prosecution approximately twenty months after the commission of the alleged offence. However, upon considering Mr. Justice Pidgeon's further statement that he could not admit to any general discretionary power in courts of criminal jurisdiction to direct a stay of proceedings properly instituted, it is improbable that he intended his comments to be given such a narrow interpretation.

Mr. Justice Estey perceived a stay of proceedings as a denial by the courts of their processes to improper use by the law enforcement officials. He found further support for his position in R. V. Bonner, a decision of the Nova Scotia Supreme Court, Appellate Division, wherein Mr. Justice MacDonald ordered a stay of proceedings upon a successful application of the defence of entrapment. He concluded as follows:[411]

> It would seem, on a pure application of criminal procedure that a stay is the proper judicial step.

However, he conceded that a stay of proceedings possesses a technical infirmity insofar as the charge remains extant in the records of the court, although there is no other forum for further processing.[412]

It has been suggested that if such a doctrine exists in law it is inapplicable to both a factual situation wherein an accused has

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411. Supra, n. 2 at 526
412. Ibid., at 534

undergone several trials on the same charge over a lengthy period of time when his earlier conviction had been quashed, and delay in initiating the proceeding. It was concluded as follows:[413]

> Even if the doctrine of abuse of process does exist, and a concomitant discretion lies with the criminal courts, it appears, in light of the Osborn case and latterly the Rourke case, that factual situations which would constitute 'exceptional circumstances' are so rare as to be predictably more theoretical than practical.

Judicial and prosecutorial functions have traditionally remained separate and distinct and the courts have resisted any urge to exercise a discretionary power in the executive function. It is concluded that a danger of blurring these distinct functions was recognized by Mr. Justice McIntyre of the British Columbia Court of Appeal in Re Regina and Rourke, wherein he stated as follows:[414]

> In the exercise of discretionary power of the nature here under discussion, the Courts must not be allowed to become in addition to judges of the cases presented to them, judges of what cases shall be permitted to come to them.

It is concluded that a stay of proceedings if available persuant to the doctrine of abuse of process or under section 24 of the Charter of Rights, to be subsequently discussed, is inappropriate as a remedy to a doctrine of entrapment. It is concluded that a stay of proceedings will not effectively achieve the objectives of a doctrine of entrapment. It is unlikely that such a remedy would deter law enforcement officials from undesirable conduct not would it provide a suitable and just means of dealing with the accused in all the circumstances. A stay of proceedings would permit an admittedly guilty accused, who has committed all the constituent elements of an offence charged as the result of official instigation, to go unpunished. Additionally, the public at large would suffer as a result of a guilty accused being set free, while the offending officer goes unpunished.

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[413] Supra, n. 410 at 133

[414] (1974) 16 C.C.C. (2d) 133, (B.C. S.C.); (1976) 25 C.C.C. (2d) 555 at 565 (B.C. C.A.)

MITIGATION OF SENTENCE

The English judicial system has arrived at a "viable alternative measure to recognizing a defence of entrapment."[415] In circumstances wherein all essential constituent elements of an offence have been established, the surrounding circumstances, such as the persuasive or inducing conduct of the law enforcement officials or their agents in inciting or instigating the commission of the offence, are irrelevant to the determination of guilt or innocence. However, these surrounding circumstances are an important factor which should be considered by the courts in assessing an appropriate sentence. Such an alternative remedy is in accordance with existing remedies and practices of sentencing in the Canadian criminal justice system.

Official involvement in an offence has long been recognized as affording grounds for the mitigation of penalty. In Browning v. Watson, the Divisional Court strongly disapproved of the conduct of the licensing officials in their conduct which amounted to entrapment and remitted the case to the magistrate reminding them of their power to grant an absolute discharge without ordering payment of costs.[416] In the English case of R. v. Birtles,[417] Lord Parker reduced the sentence imposed on the accused on the basis that there was a real possibility that the accused had been encouraged by an informer and a law enforcement officer to commit the offence.

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[415] Supra, n. 57 at 332

[416] [1953] 1 W.L.R. 1172 at 1177 (Div. Ct.)

[417] [1969] 2 All. E. R. 1131 (C.A.)

Although entrapment is denied in England as a substantive defence which would go to the determination of guilt or innocence, those circumstances which might give rise to the defence in another jurisdiction where the defence is accepted are considered to be relevant in sentencing. As Lord Widgey stated in R. v. Mealey and Sheridon:[418]

> ...it is in our judgement clearly established that the so-called defence of entrapment, which finds some place in the law of the United States of America, finds no place in our law here. It is abundantly clear on the authorities, which are uncontradicted on this point, that if a crime is brought about by the activities of someone who can be described as an *agent provocateur*, although that may be an important matter in regard to sentence, it does not affect the question of guilty or not guilty.

In R. v. Sang, Lord Diplock indicated that the conduct of law enforcement officials involving the use of *agent provocateurs* may well be a matter to be taken into consideration in mitigation of sentence but "does not give rise to any discretion on the part of the judge himself to acquit the accused or to direct the jury to do so, notwithstanding that he is guilty of the offence."[419] He further indicated his rationale for rejecting the submission that official instigation should lead to an acquittal and his acceptance of the view that it is only relevant to the question of sentence as follows:[420]

> Many crimes are committed by one person at the instigation of

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418. Supra, n. 4 at 62
419. Supra, n. 32 at 1227
420. Ibid., at 1226

> others. From earliest times at common law those who counsel and procure the commission of the offence by the person by whom the actus reus itself is done have been guilty themselves of an offence and...can be tried indicted and punished as principle offenders. The fact that the counsellor and procuror is a policeman or a police informer, although it may be relevant to mitigation of penalty for the offence, cannot affect the guilt of the principal offender, both the physical element (actus reus) and the mental element (mens rea) of the offence with which he is charged are present in the case.

Lord Salmon correctly concurred with this opinion and indicated that the court may, according to the circumstances impose a mild punishment of even grant an absolute or conditional discharge to the accused.

The Law Commission expressed the following view of the appropriateness of the remedy of mitigating the sentence of the accused when the circumstances indicate that the offence was committed at the inducement or instigation of a law enforcement officer, in the following manner:[421]

> ...no doubt that mitigation of penalties is neither adequate or, perhaps even relevant in the control of the activities of those responsible for entrapment....It is difficult to see how mitigation by itself can exert any influence upon those responsible for the entrapping conduct. Mere mitigation is not a sufficient disincentive to the continuance of objectionable practices; it cannot be regarded as an adequate means of control in pursuance of the overall aim of ensuring that the State's law enforcement agencies, in combatting crime do not themselves instigate it. In entrapment cases, the conduct of both prosecution and defendant is reprehensible for the latter has, after all, been held to have committed an offence. Mitigation, however, is essentially of relevance only to his conduct not to that of the prosecution.

The view of the Law Commission combined with that of Lord Diplock in R. v. Sang, indicated that view which is considered most appropriate in dealing with entrapment in Canada. As Lord Diplock stated, the fact that an individual was induced to commit an offence may result in both the counselor or procuror and the entrapped accused being considered criminally liable for their conduct. The accused's culpability may be mitigated by the persuasion or inducement held out by the officer to instigate the offence. However, as the Law Commission indicated both the official's and the defendant's conduct are reprehensible and it would, therefore, be inappropriate that either should go unpunished. However, such punishment or sentence should reflect all relevant surrounding circumstances.

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[421] Supra, n. 43 at 46

Additionally, mere "mitigation by itself" is not a sufficient disincentive to deter improper police conduct as will be subsequently indicated. Mitigation of sentence provides a means whereby the courts may assess a sufficiently just sentence to an accused appropriate to the circumstances.

Further, mitigation of sentence provides a means whereby the courts may protect their own integrity, firstly, by not acquitting an admittedly guilty accused who has committed all the constituent elements of an offence and, secondly, by providing a means whereby the courts may deal with the accused in a manner appropriate to the circumstances. Having committed the offence it would not be just that he be acquitted, but the reason for the commission of the offence may be reflected in the sentencing process, following conviction.

To effectively achieve all the objectives of a doctrine of entrapment some additional technique must be considered so as to deter the undesirable official conduct. This additional technique, being the prosecution of the offending officer, which will be discussed subsequently, combined with the mitigation of sentence should effectively achieve all the desired objectives of the doctrine of entrapment.

Mr. Justice Rhenquist, in *United States v. Russell*, indicated a somewhat similar opinion when he stated as follows:[422]

> Nor does it seem particularly desirable for the law to grant *complete* immunity from prosecution to one who himself *planned* to commit a crime, and then committed it, simply because government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed. [emphasis added]

Mitigation of sentence has been employed in Canada to express judicial disapproval of the manner in which certain evidence was obtained. In *R. V. Steinberg*,[423] the Ontario Court of Appeal reduced a fine by one half when it was revealed that the evidence was obtained by the use of electronic devices.

The Ontario Court of Appeal, in *R. v. Ormerod*, considered an accused charged with trafficking in narcotics, and Mr. Justice McGillivary stated that, had it been established that the law enforcement officials had authorized or even encouraged the accused to commit the offence, "some modification in sentence should be imposed."[424] Mr. Justice Bull for the British Columbia Court of Appeal in *R. v. Chernecki*, concluded his judgement by reference to the comment of Mr. Justice Judson in *Lemieux v. The Queen* that the fact the accused had committed the prohibited act at the solicitation of an *agent provocateur* was irrelevant to the question of guilt or innocence. He concluded by stating, in *obiter dicta*, as follows:[425]

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[422] *Supra*, n. 24 at 435

[423] [1967] 1 O.R. 733 (Ont. C.A.)

[424] *Supra*, n. 113 at 5

[425] [1971] 5 W.W.R. 469, 16 C.R.N.S. 230 at 233, 4 C.C.C. (2d) 556 (B.C. C.A.)

> I should add that I can see where the fact of 'entrapment' might be very relevant in certain circumstances to the matter of sentence.

Mr. Justice Brooke, in R. v. Kirzner,[426] for the Ontario Court of Appeal, dismissed the accused's appeal against conviction but varied the sentence imposed as a reflection of the role of the law enforcement officials in exposing the accused to the temptation of dealing in illicit narcotics. The trial judge in R. v. Amato, notwithstanding that he was satisfied that there was insufficient evidence to establish entrapment, made the following observations regarding the matter of sentencing:[427]

> Notwithstanding that you were persuaded by some continuing persistence to get involved in the trafficking of cocaine, I was not and I am still not satisfied that the persistence used upon you legally justifies your actions. I am, however, satisfied that the persistence is something that I must take into consideration in imposing a sentence upon you.

The British Columbia Court of Appeal in R. v. Amato, agreed that there was insufficient evidence to establish entrapment. However, Mr. Justice Seaton, added, in obiter dicta, that he favoured the English approach over that of the United States, and concluded as follows:[428]

> In my view, the Court in considering a criminal case should try the accused and not the police. It should determine whether the accused committed the offence with which he is charged and if he did he should be found guilty, if not, he should be acquitted. If found guilty, upon sentencing the Court should give attention to what motivated him and to any influence that others had upon him; 'others' would include the police. This is done in courts everyday. Often a heavier sentence will be imposed on one than on another because the first is the leader and the second is the follower. The influence of others on a person being sentenced is a matter of great importance and I think that influence of the police on one can be dealt with in that manner.

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[426] (1977) 14 O.R. (2d) 665 at 667 (Ont. C.A.)
[427] Quoted by Estey, J., in Amato v. The Queen (S.C.C.)
[428] (1979) 51 C.C.C. (2d) 401 at 405 (B.C. C.A.)

The approach referred to by Mr. Justice Seaton is the most appropriate and acceptable within the established principles and practices of sentencing which govern Canadian criminal justice. It is unnecessary to distort other existing principles, such as abuse of process of the court or exclusionary rules of evidence. The accused who is able to establish that he was motivated or induced to commit an offence as the result of the conduct of others, including law enforcement officials, can readily avail himself of these established principles and rules of practice which permit the court to mitigate his sentence under appropriate circumstances. Such a remedy provides that the "victim" of entrapment will will be granted relief proportionate to his diminished culpability based on the degree to which he was motivated, influenced, or induced to commit the offence.

One of the most often expressed objections to employing the remedy of mitigation of sentence where entrapment has been established is that the Canadian courts are unable to grant either absolute or conditional discharges where the maximum penalty is fourteen years or more.[429] An objection of perhaps greater significance is the existence of minimum sentences for certain offences such as the importing of narcotics.[430] England, unlike Canada, has no such restriction on the granting of discharges.

Mr. Justice Estey, in Amato v. The Queen, indicated substantial minimum sentence requirements imposed for certain offences under the Criminal Code and the Narcotic Control Act as a serious limitation to reliance upon mitigation of sentence as a judicial response to the problem of official instigation of crime. He was of the opinion that Parliament could not have had in mind in establishing such penalties an accused who could demonstrate that the crime was instigated by the State itself. He concluded by stating as follows:[431]

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[429] s. 662.1 of the Criminal Code
[430] s. 5 of the Narcotic Control Act

> ...the repugnance which must be experienced by a court on being implicated in a process so outrageous and shameful on the part of the state cannot be dissipated by the registration of a conviction and the imposition thereafter of even a minimum sentence. To participate in such an injustice up to and including a finding of guilt and then to attempt to undo the harm by the imposition of a lighter sentence so far from restoring confidence in the fair administration of justice would constitute the opposite result.

There are two possible responses to these obiter dicta comments. The first is that the only intent that Parliament had upon enacting legislation and imposing minimum sentence requirements following conviction was to prohibit the activity contained therein and to demonstrate the seriousness with which they considered a violation thereof and, consequently, all who violate these offences, including those who are induced by a law enforcement official, should receive, at the very least, the minimum sentence. The second response, and possibly one which would be more appropriate, would be to follow the example of England and, through a legislative change, eliminate the present restriction on granting absolute and conditional discharges and, further, eliminate the minimum sentence provisions when the offence has been officially induced.

M. L. Friedland, who also concluded that a number of techniques are necessary to properly respond to instigation of criminal offences by law enforcement officers, made the following statement regarding the objection to the use of mitigation of sentence in entrapment situations as a result of provisions prohibiting the granting of an absolute discharge:[432]

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[431] Supra, n. 2 at 538-9

> Whether or not a defence is permitted, the court should continue to take entrapment into account in sentencing, including the possibility of granting an absolute discharge. The Canadian Criminal Code should be amended to eliminate the present restriction preventing the granting of a discharge in certain cases where the possible penalty is fourteen years or more.

Such a recommendation would effectively defeat one of the principle objections to employing the sentencing process as a means of providing a remedy for an accused in entrapment situations. It is concluded that mitigation of sentence remains the most viable and acceptable method for providing an appropriate remedy to an admittedly guilty accused who has committed all of the requisite constituent elements of the offence charged and who perceives himself aggrieved by the fact of entrapment.

SECTION 24 OF THE CHARTER OF RIGHTS

Should an accused be able to establish that his rights or freedoms, as guaranteed by the Charter of Rights, such as his right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice under section 7, have been infringed or denied, he may avail himself of the enforcement section which provides as follows:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

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[432] Supra, n. 12 at 30

> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Both of these subsections would provide remedies upon a successful maintenance of a defence of entrapment. The more limited remedy, under section 24(2), would be available if the conduct of the law enforcement official or his agent inducing or inciting a criminal offence is so outrageous and shocking to the public as to bring the administration of justice into disrepute, and would thereby be considered a denial or infringement of the rights or freedoms under the Charter of Rights. Should such a violation of the Charter of Rights be established, the appropriate remedy would be to exclude the evidence obtained thereby.

The meaning attached to the phrase "would bring the administration of justice into disrepute" may be interpreted according to the judgement of Mr. Justice Lamer in Rothman v. The Queen.[433] In arriving at a test for determining the admissibility of a confession, Mr. Justice Lamer would have added the further requirement that a statement made by an accused to a person in authority, although otherwise admissible,

> ...shall nevertheless be excluded if its use in the proceedings would, as a result of what was said or done by any person in authority in eliciting the statement, bring the administration of justice into disrepute.

He further indicated that,[434]

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[433] [1981] 1 S.C.R. 640, 59 C.C.C. (2d) 30 at 74, 20 C.R. (3d) 97 (S.C.C.)

[434] Ibid., at 74-5

> ...if the second portion of the rule is not a true discretion, it is even less a blanket discretion given Judges to repudiate through an exclusionary rule any conduct on the part of the authorities a given Judge might consider somewhat unfortunate, distasteful, or inappropriate. There first must be a clear connection between the obtaining of the statement and the conduct; furthermore the conduct must be so shocking as to justify the judicial branch of the criminal justice system in feeling that, short of disassociating itself from such conduct through rejection of the statement, its reputation and, as a result, that of the whole criminal justice system, would be brought into disrepute.
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> The Judge, in determining whether under the circumstances the use of the statement in the proceedings would bring the administration of justice into disrepute, should consider all of the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which there was a breach of social values, seriousness of the charge, the effect the exclusion would have on the result of the proceedings. It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must somestimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community....generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community, nor would, as in this case, pretending to be a truck driver to secure the conviction of a trafficker; in fact, what would shock the community would be preventing the police from resorting to such a trick.

Mr. Justice Estey took the position that the overriding requirement for the admission of the statement was that it "not render the administration of criminal justice unacceptable in the community."[435]

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[435] Ibid., at 57. See also Samson v. The Queen (1983) 29 C.R. (3d) 215, wherein the meaning of section 178.16 (2) of the Criminal Code was interpreted. Judge Borins, in discussing the phrase "would bring the administration of justice into disrepute;" within the context of this section concluded that "the fundamental nature of the impropieties and their magnitudes, are such that discredit would be brought to the administration of justice were the court, on the one hand, to excuse the breach...by excluding the primary evidence and, on the other had to excuse the breach be admitting the derivative evidence.

However, in a discussion of entrapment in his dissenting opinion in Amato v. The Queen, he appeared to accept the more stringent test of Mr. Justice Lamer that the evidence would be excluded if "the scheme so perpetrated must in all the circumstances be so shocking and outrageous as to bring the administration of justice into disrepute."

The provisions of subsection 24(1) of the Charter of Rights provides a considerably more extensive remedy to an individual who is able to establish an infringement or denial of his rights or freedoms as guaranteed by the Charter of Rights. The court may grant such remedy as it "considers appropriate and just in the circumstances." This phrase has been interpreted in the following manner:[436]

> Some commentators have suggested that this phrase authorizes a court to grant any remedy it wishes as long as it is appropriate and just in the circumstances. As suggested above, the better and more likely interpretation of this clause is that it authorizes the court, before whom an application is made, to grant any remedy normally within the jurisdiction of that court. Therefore, a provincial court, for example, will not have vastly increased remedial powers. The intent of this phrase, it is suggested, was to make it plain that an applicant is not restricted to the remedial possibilities of 'declarations and injunctions or similar relief.' The effect of this phrase on the Court of Queen's Bench, which has inherent jurisdiction to grant any remedy unless statutorily prohibited, may be to encourage creativity in the fashioning or orders to deal with Charter violations....Remedies which one can expect to see granted by the appropriate court under section 24(1) include injunctions, declarations, damages, perogative remedies such as mandamus, certoriari, prohibition and habeas corpus, stay of proceedings, costs, acquittals and exclusion of evidence.

However, in circumstances amounting to entrapment, the question is not which of these remedies are available but rather which of the available remedies is appropriate in order to most effectively achieve all of the objectives of a defence or doctrine of entrapment. It is contended that a stay of proceedings, an acquittal or exclusion of evidence, although available under the provisions of this remedial section, suffer from the same weaknesses as if they were available under the common law prior to the Charter. These weaknesses have been previously discussed with the conclusion that neither stay of proceedings, exclusion of evidence, nor an acquittal would achieve all the desired objectives of the doctrine of entrapment. The fact that these remedies are now available under the Charter of Rights does not eliminate those fundamental flaws contained in their nature when applied to a situation constituting entrapment.

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[436] Supra, n. 346 at 220

CHAPTER NINE

INTERNAL DISCIPLINARY PROCEDURE AS AN ALTERNATIVE METHOD OF CONTROLLING ENTRAPMENT

If it is accepted one of the objectives of the doctrine of entrapment is to deter improper and undesirable behaviour by law enforcement officials and their agents, it is contended that the normal method of preventing unacceptable conduct is by making it illegal and providing for a sanction. This was stated by the Law Commission as follows:[437]

> If, therefore, it is desired to prevent people from persuading or instigating others to commit offences, this ought to be done by making such persuasion or incitement illegal and by providing sanctions against those responsible.

It has also been suggested that "administrative transfers or suspensions combined with a loss of the conviction are the proper way to handle such over zealousness" except in those instances where an officer acts on personal motives, which would be determined by establishing that he acted without reasonable suspicion, in which instance he should be subject to criminal prosecution.[438]

Although this suggested approach has properly recognized that no single remedy will effectively achieve all of the desired objectives of a doctrine of entrapment, and that a combination of techniques or remedies may be necessary, it is contended that the proposed combination of remedies is not the most effective available. The failure to convict because of either an acquittal, stay of proceedings or exclusion of evidence, has been previously examined and proven to be inappropriate as a means of properly dealing with an accused who has admittedly committed all the constituent elements of an offence but who claims, either as a defence or in mitigation, that he was induced to commit the offence by a law enforcement official. If anything, the proposed combination suggested by Bancroft should include mitigation of the sentence as a means of dealing properly with the accused, combined with a technique for deterring the officer's unacceptable conduct.

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[437] Supra, n. 43 at 49
[438] D. P. Bancroft "Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defence" 31 U. of Chi. L. Rev. 137 at 176

However, it will be established that internal disciplinary procedures are not the most effective way of deterring such behaviour. Administrative transfers or suspensions are unlikely to be administered consistently or severely where the officer is perceived to be acting in the performance of his duty to obtain evidence for a conviction.

The Law Commission concluded that in situations so relevant to the liberty of the subject, reliance upon disciplinary proceedings cannot be regarded as fully adequate to prevent entrapment practices from being employed. They indicated that the primary disadvantage of such a control mechanism is that it relates solely to the police and is therefore of little value in controlling the conduct of agents and informers. Additionally, the Commission suggested that there would be a natural reluctance on the part of the police in initiating disciplinary procedures against an officer for his methods employed in attempting to gain evidence for a conviction.[439]

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[439] Supra, n. 43 at 49-50

M. L. Friedland suggested that one possible method of controlling entrapment would be to have the Solicitor-General and provincial Attorney-General issue detailed guidelines to their respective police forces relating to their dealings with informers and the instigation of criminal offences. These guidelines could be similar to those issued by the Home Office in England in 1969 or by the Attorney-General in the United States in 1976. Breach of such guidelines would result in internal disciplinary actions. However, he cautioned that such disciplinary action is only relevant to police officers and inapplicable to non-official informers.[440] Such a proposal is subject to the same objections as are being raised in regard to existing internal disciplinary procedures.

It is concluded that internal disciplinary actions are inadequate as a means of controlling entrapment practices as such action relates solely to the conduct of the law enforcement official and is inapplicable to their informers and agents. Similarly, it is questionable if such sanctions would be applied with any degree of consistency or severity having regard to the fact that the offending officer may be perceived to have been performing his function of obtaining evidence for the prosecution of an accused. It is further concluded that such sanctions would not be applied with sufficient severity to constitute a proper deterrent. On the basis of these observations it is concluded that internal disciplinary procedures are neither adequate nor appropriate as a means of achieving one or more of the objectives of a doctrine of entrapment.

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[440] Supra, n. 12 at 29. In reference to the guidelines of the Home Office of England, see appendix 4 to the Law Commission Report No. 83, supra, n. 43. In reference to the United States guidelines, see the memo from Edward H. Levi, Attorney-General, to Clarence Kelley, Director F.B.I., dated December 15, 1976.

CHAPTER TEN

TORTIOUS LIABILITY OF LAW ENFORCEMENT OFFICIALS AND THEIR AGENTS

There are two primary objectives of designing a remedy for the breach of rules governing the behaviour and conduct of law enforcement officials and their agents amounting to entrapment. These objectives are the deterrence of a continuation of the undesirable conduct and to respond appropriately and justly to an accused who perceives himself aggrieved by such official misconduct but yet who has intentionally committed the criminal act. It has been suggested that the criminal law sanctions and remedies are inadequate for the following reasons:[441]

> In the first place criminal law sanctions cannot be a credible deterrent to unlawful police activity. The investigative and prosecutorial institutions which are necessary to implement the criminal law includes the intended criminal defendant and thus there is a built in disincentive to activating these processes.

Having arrived at this conclusion regarding criminal sanctions, which overlooks the possibility of a victim of unlawful official action initiating a private prosecution, Weiler examined the efficacy of implementing tort law as a viable alternative regulatory device for controlling undesirable conduct of law enforcement officials. He indicated that there are serious limitations to the employment of tort law as a means of effectively achieving the desired objectives of a doctrine of entrapment. The imposition of such a sanction is normally dependant upon someone being hurt, upon his making the decision to seek redress, and the "effectiveness of his resources alone to establish the breach." He further stated as follows:[442]

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[441] Paul C. Weiler "The Control of Police Arrest Practices; Reflections of a Tort Lawyer," in Allen M. Linden (ed.) Studies in Canadian Tort Law (1968) 416 at 443.

> The sanction itself is not rationally related to the enormity of the defendant's conduct but rather to the seriousness of the plaintiff's loss.

In many instances the loss or harm is non-economic, and can best be described as psychological harm, and there is "no rational way of relating the loss suffered to the remedy awarded."[443] The remedy is dependant upon "the purely subjective intuitive guess of a jury or a judge."[444]

Although Weiler proposed, as the most efficacious remedy within the law of tort, a legal regime wherein the offending officer is individually liable for all harm caused by "intentional or malicious 'abuse of his powers" and that his employer should be vicariously liable for all harm caused by the officer's "unreasonable conduct," he concluded as follows:[445]

> We are still left with the problem of devising an effective method of judicial control of the police, because tort law has deficiencies both in the remedy or sanction it provides and in the quality of substantive judgements likely to result from the sporadic intervention of the courts.

M. L. Friedland rejected the imposition of civil liability on the instigator of a criminal offence as an ineffective method of controlling improper entrapment as it would be difficult to obtain success in such an action if the entrapment did not also result in a defence to the criminal offence instigated. Additionally, it would be ineffective as damages awarded would, in all likelihood, be minimal.[446]

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[442] Ibid., at 444
[443] Ibid., at 446
[444] Ibid., at 447
[445] Ibid., at 457

As the plaintiff to the action is an individual who intentionally committed a criminal act and whose only defence was that he was persuaded by a law enforcement officer to commit the crimes, it is unlikely that a jury in a civil action for damages would indicate an excessive degree of sympathy for his cause.

J. D. Heydon expressed his dissatisfaction with civil remedies in entrapment situations as follows:[447]

> Civil action for trespass, assault, false arrest and damage to property may be unsatisfactory in several ways. The individual policeman may not be thought to be worth suing. In any event he will not be deterred by the fear of such actions because of the convention that the local police authority indemnifies him. Section 48 of the Police Act 1964 provides that Chief Constables are vicariously liable for torts committed by constables under their direction, and a successful claim may lead to better internal discipline; but damages and costs are payable out of the police fund and not by the Chief Constable personally. The victim may fear the further loss of privacy entailed in a suit or subsequent police visitation. Substantial damages are only recovered in the event of actual loss or malice; they may be mitigated by the plaintiff's bad reputation which will also affect his credibility and increase the chance of a finding of reasonable cause for arrest. Aggravated damages may be awarded in respect of oppressive, arbitrary or unconstitutional conduct by State servants, but juries are unlikely to so punish an officer whose efforts, albeit illegal, uncovered crime.

It is concluded that tort law is inappropriate as a means of controlling official instigation of criminal offences as the individual seeking either relief or a sanction against the offending officer is usually financially incapable of undertaking the lengthy, complicated and expensive civil action. Nor is he often even aware that such a remedy is available.

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[446] Supra, n. 12 at 25
[447] Supra, n. 383 at 693

Additionally, any award of damages a law enforcement officer, whom the jury perceives as merely carrying out his duties, granted to the plaintiff, perceived as a criminal who was caught in the commission of an offence, is in all likelihood to be minimal. Further, it is unlikely to act as an effective deterrent as any award granted would be paid from a police reimbursement fund. It is, therefore, concluded that tort law is neither an effective nor appropriate method of achieving the desired objectives of a doctrine of entrapment within the Canadian criminal justice system.

CHAPTER ELEVEN

PROSECUTION OF LAW ENFORCEMENT OFFICIALS AND THEIR AGENTS

UNDER EXISTING LEGISLATION

Determination of the liability for prosecution of offending law enforcement officials and their agents who participate in the commission of a criminal offence or who counsel, incite, or instigate the commission of a criminal offence in order to obtain evidence for the purpose of prosecuting the person so instigated may provide an alternative method of controlling the practice of entrapment. It is contended that a law enforcement official or his agent, subject to specific statutory exemptions, is as criminally liable for his actions as is an ordinary citizen.

The liability of law enforcement officials to prosecution for their involvement in inducing the commission of an offence was established in the United States in Reigan v. People,[448] where two game wardens were charged with conspiracy to commit an unlawful act arising from their alleged conspiracy with two other individuals to commit an offence in order to obtain evidence to prosecute them. The court held that the defence of committing a criminal act in order to obtain evidence was valid,[449]

> ...if the cooperation of the defendants amounted to no more

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[448] 120 Colo. 472, 210 P. 2d 991 (1949)
[449] Ibid., at 478

> than an effort to 'detect a violation of the law on the part of the two boys then the defendants could not be convicted of a conspiracy. If, however, the conduct of the defendants amounted to 'entrapment' of the boys the judgement must stand.

It was suggested that this decision should be interpreted in the following manner:[450]

> Thus the officers assumed the risk. If they go too far and entrap, they, the entrappers, are guilty; the entrapped are not. This double sanction may make the police more cautious in their use of encouragement.

If an officer, notwithstanding that he was acting form the best of motives, violates the law he should be prosecuted. However, to suggest that a double sanction against a law enforcement official who entraps another into the commission of an offence would serve as a satisfactory means of controlling entrapment overlooks the fact that the entrapped individual, who was motivated by the same factors as any other criminal, is to be provided with an absolute defence. There are in fact two offenders, the entrapper and the entrapped, yet the one who offended with the highest motive is to be twice sanctioned by his own prosecution and the loss of a conviction, whereas the one with the basest motive is to be left unpunished. There must certainly exist a more appropriate and effective means of dealing with the practice of entrapment then suggested in Reigan v. People.

In Hampton v. United States, the court was of the following opinion:[451]

> If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies,

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[450] Supra, n. 54 at 887

[451] Supra, n. 151 at 1650

> not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state and federal law.

In the English decision of Brannon v. Peek, a decision of the King's Bench, Lord Goddard stated as follows:[452]

> It cannot be too strongly emphasized that, unless an Act of Parliament provides for such a course of conduct - and I do not think any Act of Parliament does so provide - it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected. It is not right that police authorities should instruct, allow or permit detective officers or plain clothes constables to commit an offence so that they can prove that another person committed an offence.

While acknowledging that a law enforcement official who, for the purpose of entrapping another, commits a criminal offence can himself be liable for prosecution for an offence, the Law Commission indicated as follows:[453]

> ...the essence of entrapment is that the entrapper incites someone to commit an offence or participates in the commission of an offence intending that the person incited or assisted shall himself be convicted of a criminal offence, but that the evil at which Parliament directed the offence, shall not be successfully completed....It has been suggested that, in such cases, the entrapper is in fact an accomplice, and, where the mental element of the offence incited is limited to an intent to do the act constituting the offence, this may at present be the case. In principle, however, we do not think it appropriate that a trapper should in such circumstances be guilty of complicity in the offence committed or attempted by the trapped criminal. Complicity as an accessory in the offence carries with it the risk of the same maximum penalty on conviction as for those actually committing it....

The Commission continued by stating that no matter how undesirable were the methods of a law enforcement official in entrapping the accused into the commission of a criminal offence it was not acceptable that the officer who, for example, had entrapped a trafficker in narcotics should himself be subject to a maximum penalty of fourteen years, "since his activities are, after all, aimed at stultifying the offence." They concluded that it was inappropriate to prosecute the law enforcement official as a secondary party to the offence encouraged and that it was not an "advisable course to take in order to control undesirable practices." It was also feared that the threat of prosecution might inhibit even the legitimate activities of employing informers, agents and spies, or in the use of traps or decoys,[454]

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[452] Supra, n. 29 at 573-4
[453] Supra, n. 43 at 50

When a law enforcement official or his agent commits a minor criminal or regulatory offence in order to obtain evidence for a prosecution of another offence, he should not be liable for conviction. The officer who takes possession of a narcotic in order to obtain evidence of a completed illegal sale of the narcotic should not be liable to prosecution for the offence of illegal possession of a narcotic, not because he is an officer of the law and somehow exempt from the consequences of breaching a statute but, rather, because the Parliament has decreed that such conduct should not be held to constitute an offence. A specific regulation under the Narcotic Control Act permits him to have possession for the purpose of, and in connection with his employment. This proposition has been stated as follows:[455]

> It is not that the police should be exempt from the law, but that the law should not make such conduct criminal.

Clearly those offences, the commission of which are considered to be necessary or excusable if committed by a law enforcement official or his agent in the course of their employment, such as possession of a narcotic, possession of liquor and violations or offences under the Highway Traffic Act, should be statutorily exempted by specific legislation. These are legitimate and necessary exemptions without which, for example, the police could not take possession of prohibited substances during the investigation of an offence nor could they exceed the speed limit in the pursuit of offenders without themselves being subject to conviction. These are offences which Parliament, in its wisdom, decreed were necessary for proper police investigation. However, there is no specific statutory provision exempting a law enforcement officer from criminal liability for inciting a criminal offence pursuant to section 422 of the Criminal Code. A violation of this latter provision by a law enforcement officer is central to this technique of deterrence, and will be subsequently discussed in greater detail.

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[454] Ibid., at 50-1
[455] Supra, n. 12 at 27

M. L. Friedland, suggested that the enactment of a statutory provision by Parliament similar to that found in the New Brunswick Police Act,[456] protecting undercover law enforcement officials "from criminal liability for minor offences" who "act reasonably in carrying out their lawful duties," would assist the officers in the performance of their duties without creating dangers of abuse. Although he continued by indicating that such protection in certain areas might imply a lack of protection in others.[457] J. D Heydon also agreed that legislation expressly exempting police from criminal liability has been interpreted as suggestive that, in the absence of such provisions, they should be convicted.[458] However, any such difficulty could be overcome by specific reference in the exempting provision to the fact that the section is not all-inclusive.

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[456] New Brunswick Police Act, S.N.B., 1977, C-P-9.2 s. 3(4) provided as follows: "A member of the Royal Canadian Mounted Police or a member of a police force shall not be convicted of a violation of any Provincial statute if it is made clear to appear to the judge before whom the complaint is heard that the person charged with the offence committed the offence for the purpose of obtaining evidence or in carrying out his lawful duties."

The Alberta Supreme Court, Appellate Division, in R. v. Petheran,[459] considered a situation of a law enforcement official who fell within the parameters of a Liquor Act offence but was not protected by any statutory exemption. The officer had purchased liquor from one who was illegally selling the liquor, with the objective of obtaining evidence with which to prosecute the vendor. Such a transaction necessarily put the officer in possession of the liquor which was an illegal act. The vendor had the officer charged accordingly.

The court acknowledged that the legislature had evidently considered that there would be instances where violation of a statute might be justified in the interest of justice, but confined such exemptions within very narrow bounds.[460] The court held that the officer could not justify the act because of a duty performed under instructions from a superior officer not did he fall within any exemptions from liability pursuant to the Alberta Police Act. Though the officer was not held to be an accomplice it was indicated that, in the absence of specific exemptions, he cannot, in performance of his duties, breach a statutory provision.[461]

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[457] Supra, n. 12 at 28-9
[458] Supra, n. 11 at 276
[459] (1936) 65 C.C.C. 151, [1936] 2 D.L.R. 24 (Alta. C.A.)
[460] Ibid., at 156

It has been suggested by M. L. Friedland that the decision of R. v. Petheran would not be followed at present in other cases involving purchase of a prohibited substance, or at least would be distinguished as being dependant upon the specific legislation.[462]

In the Ontario Court of Appeal decision of R. v. Ormerod, an accused testified that he was acting as the agent of the law enforcement officials while he was trafficking in narcotics and, therefore, he should be exempt from criminal liability. Mr. Justice Laskin stated that it is impossible to contend that an agent has a defence if the law enforcement officials from whom he claimed to have received his instructions were not exempt from prosecution for the same activity.[463] In considering whether the law enforcement officials would have been exempt from criminal liability had they breached the statute, he considered the reference to "public duty" mentioned in R. v. Hess (No. 1)[464] which dealt with the handling of an illegal item for the purpose of turning it over to the proper authorities. He concluded that such a "public duty" did not apply in the particular case. He further stated as follows"[465]

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[461] See also R. v. Gilmore (1928) 43 B.C.R. 57, wherein an agent working undercover broke into a house to assist in the apprehension of a suspect. It was held that his intention was to assist the police in detecting crime and not to commit an offence; and Evans v. Pesce and Attorney-General of Alberta (1969-70) 8 C.R.N.S. 201 (Alta. S.C.), wherein an individual arrested for trafficking solicited by the police, sought a mandamus to have the lower court proceed with the hearing in which he had charged the police as an accomplice. The court dismissed the mandamus on technical grounds, but did indicate that the constable was not an accomplice as the interest of the parties as vendor and purchaser were distinct.

[462] Supra, n. 12 at 26

[463] Supra, n. 113 at 14

[464] (1949) 94 C.C.C. 48, [1949] 1 W.W.R. 577, [1949] 8 C.R. 48 (B.C. C.A.)

> In principle, the recognition of 'public duty' to excuse breach of the criminal law by a policemen would involve a drastic departure from constitutional precepts that do not recognize official immunity, unless statute so prescribes....Legal immunity from prosecution for breaches of the law by the very person charged with a public duty of enforcement would subvert that public duty.

It has been suggested that the lack of mens rea is a possible defence to certain, if not most, offences, including aiding and abetting as it recognizes "purpose," but that it will not be of assistance in those instances where no mens rea is required.[466] It has been further suggested that in an offence such as larceny or burglary the "intent rationale will support an acquittal." Mr. Justice Laskin dealt with this issue in R. v. Ormerod when he stated as follows:[467]

> ...a general want of intent to break the law is not a defence where a person carries out forbidden acts intending to do them or knowing what he is in fact doing. That he does them for a laudable purpose or from a high motive ...is beside the point....It may be enough, in a particular case, to save him from prosecution or to result in mitigation of sentence if a prosecution is lodged but I cannot see that he can be rescued from guilt if prosecution is undertaken.

That which Mr. Justice Laskin has indicated as being the result if a law enforcement official commits an offence for a laudable purpose must be equally applicable to an individual who commits a criminal offence as a result of inducement or instigation motivated by the ordinary factors which affect an individual contemplating criminal activities. Once a criminal prosecution of such an individual is undertaken the fact of entrapment, while perhaps being relevant to mitigation of sentence, cannot "rescue" him from guilt.

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[465] Supra, n. 113 at 17. See also R. v. Benjoe (1961) 35 C.R. 157, 130 C.C.C. 238, 34 W.W.R. 463 (Sask. Q.B.), wherein it was stated that "the notion of 'public duty,' so far as it is reflected in the case emerges only as an element that supports the absence of mens rea."

[466] Supra, n. 12 at 27

[467] Supra, n. 113 at 17

In conclusion, Mr. Justice Laskin indicated that the legal duty of law enforcement officials is to enforce the law and, subject to specific statutory exemptions, are as accountable for their breach of statutory prohibitions as is an ordinary citizen.[468]

Another issue for consideration in the overall determination of the liability of law enforcement officials or their agents who participate in entrapment practices, is whether they themselves are liable to prosecution, not as an accomplice or a party to the offence, but pursuant to the provisions of section 422 of the Criminal Code which provides as follows:

> Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel, procure or incite other persons to commit offences, namely;
>
> (a) everyone who counsels, procures or incites another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and is liable to the same punishment to which a person who attempts to commit that offence is liable....

It has been suggested that if the law enforcement official is,[469]

> ...the 'causa causans' of the crime rather than merely providing an opportunity for the commission of a crime he is partially liable. However, since the police have discretion to initiate arrest and prosecution, it is only where the agent in question has exceeded that limits provided for by internal police discipline that he would be subject to such measures.

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[468] Ibid., at 19

[469] Michael Stober "Entrapment" (1976) 7 Revue Generale de Droit 25 at 50

However, it is to be recalled that the aggrieved individual or counsel acting on his behalf, may initiate private prosecutions against the offending official. Although the Attorney-General has a discretionary power to stay such a proceeding, it is considered unlikely that he would face public censure by refusing to proceed against an officer who has obviously violated the prohibition.

M. L. Friedland expressed the opinion that a law enforcement officer or his agent who attempted to persuade or induce an otherwise reluctant individual to commit a criminal offence may be charged pursuant to the provisions of section 422 of the Criminal Code with an offence of "counselling or procuring" the commission of a criminal offence.[470]

Chief Justice Laskin, in the dissenting opinion of Kirzner v. The Queen, indicated as follows:[471]

> The police, or the agent provocateur or the informer or the decoy used by the police do not have immunity if their conduct in the encouragement of a commission of a crime by another is itself criminal.

It would therefore appear that a law enforcement officer or his agent would be liable to prosecution under section 422 of the Criminal Code where his persuasion or encouragement amounted to counselling, procuring or inciting the commission of a criminal offence. Of course, this section only applies to counselling procuring or inciting of an indictable offence. A major objection to relying entirely upon the prosecution of the offending law enforcement officer under existing provisions of the Criminal Code is that such a deterrent would be unavailable to those entrapment situations where the officer incited, counselled or procured the commission of either a summary conviction or hybrid offence where the Crown elected to proceed summarily.

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[470] Supra, n. 12 at 25
[471] Supra, n. 7 at 491

It has therefore been established that a law enforcement official is liable for prosecution in circumstances where he breaches a statutory prohibition, unless falling within the ambit of a specific exemption, and that he is also liable to prosecution for inciting the commission of an indictable offence pursuant to section 422 of the Criminal Code. It is necessary to determine whether such a sanction will effectively achieve the objective of the doctrine of entrapment of dissuading the offending officer from the further continuation of such undesirable conduct.

Acknowledging that a law enforcement official is not immune from criminal prosecution where his conduct in the encouragement of the commission of a crime by another is itself criminal, M. L. Friedland expressed the opinion that, as an effective method of controlling entrapment techniques, "criminal liability against the instigator offers greater possibilities than civil liability." However, he left unanswered the question of what conduct by the law enforcement officials is itself criminal.[472]

D. L. Rotenberg rejected the liability of the law enforcement officials under the existing legislation as an ineffective means of controlling the practice of entrapment for the following reasons:[473]

> Thus, the police are usually not exempt from the operation of the criminal law, and consequently in many encouragement situations the police actually commit crimes or are parties to

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[472] Supra, n. 12 at 25-6
[473] Supra, n. 54 at 889

> the ultimate crime committed by the person encouraged. This theoretical legal limitation to police detection is not an effective limitation on police practices. Two reasons may explain this; (1) the sanction of prosecution is almost never invoked, and (2) police probably believe that, even if they are prosecuted, the judicial and community attitudes are such that no convictions, or if a conviction, no sever penalty will result. This is undoubtably premised on the further belief that certain criminal violations are or ought to be permitted as necessary to effective crime detection.

If it is accepted that one of the fundamental objectives of a doctrine of entrapment is the control of objectionable conduct by law enforcement officials in the instigation of criminal offences, it is suggested that an effective method of controlling such official misconduct would be to prosecute not only the instigated offender but also those officials or agents who breach statutory prohibitions, and, further, to prosecute those law enforcement officers and their agents who counsel, incite or procure the commission of an indictable offence pursuant to section 422 of the Criminal Code. One objection to this method of deterrence is that arrest and prosecution is often initiated by the officials themselves and as such would be requiring the law enforcement officials to regulate their own conduct. The response to this objection is that an aggrieved accused or counsel instructed and acting on his behalf, may himself initiate the prosecution by means of a private information against the offending official. The conduct of such a prosecution would then be taken over by the Attorney-General, exercising his right under the Criminal Code, as a matter of practice.

However, such a proposed technique, although serving as an effective deterrent to offending law enforcement officials in those situations where it is applicable, suffers from the fundamental weakness that section 422 of the Criminal Code does not extend to those officials who counsel, incite or procure an individual to commit either a summary or hybrid offence where the Crown has elected to proceed summarily. It is therefore concluded that some additional provision is required, presumably by way of amendment to the Criminal Code, wherein an officer who counsels, incites or procures any offence, whether summary or indictable, would be liable to prosecution. This technique will now be discussed.

CREATING AN OFFENCE OF ENTRAPMENT

Another alternative method of controlling the unacceptable practice of entrapment, suggested by the Law Commission, is the creation of a new criminal offence of entrapment. Such an offence would render an individual liable for taking the initiative in inciting or persuading another to commit or attempt to commit a criminal offence, notwithstanding that it was intended that the completion of the offence or its effect should be prevented or nullified. The Commission further indicated that such a proposed offence should not be limited to situations where, but for the instigation the accused would not have committed the criminal offence, but rather should focus upon the conduct of the entrapper alone. The essential matter to which such an offence would be directed is the "positive instigation, incitement, or persuasion to commit an offence." Such an offence,[474]

> ...would not penalize, to take two examples, either the inspector purchasing goods sold at short measure, or the intruder penetrating a suspect organization who shows 'a certain amount of interest or enthusiasm for the proposal of the organization.'

The Commission further indicated that such a proposed offence would be framed entirely in terms of the entrapper's conduct and would not be based upon the state of mind or character of the victim. They stated the advantage of such a proposal as follows:[475]

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[474] Supra, n. 43 at 51

> The main advantage of such an offence would be that it would provide a sanction against reprehensible conduct by agents without exonerating the entrapped party. It would thereby avoid one of the illogicalities we found in the provisions of a defence of entrapment.

It has been suggested that such an implementation would dismiss entrapment as a defence for the instigated offender irrespective of his predisposition while discouraging the objectionable official conduct by making it criminal. Such an approach should satisfy the demands of those who express the concern that the defence of entrapment permits the acquittal of an individual who has committed all the requisite elements of an offence. It would also satisfy those who are eager to have controls placed upon the conduct of law enforcement officials and their agents in entrapment situations. However, it has also been stated that "criminalization is of no assistance to the victim of police conduct."[476] However, the response to such an objection is that by combining the deterrent effect of the prosecution of the law enforcement official with the remedy of mitigation of sentence, which will be of assistance to the victim of official misconduct, all the objectives of a doctrine of entrapment should be most effectively achieved.

M. L. Friedland indicated that to establish guidelines for the determination of official liability may result in establishing the permissible degree of involvement "at a level too favourable to the police." He concluded as follows:[477]

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[475] Ibid., at 51
[476] Supra, n. 246 at 271
[477] Supra, n. 12 at 28

> It is for this reason that a new offence against the police, as recommended by the Law Commission, while at first very attractive, is not a desirable approach. It would rarely be used, would be pitched to allow too much instigation, and would not serve to give the required guidance in the area.

It is contended that the above reasons for the rejection of the Law Commission's proposal are inadequate. Such an offence could be drafted in a manner to provide adequate guidance or direction to the law enforcement officials, and could be initiated by the aggrieved accused by means of a private prosecution if the Crown failed to respond in the appropriate circumstances. Further, whether it is "too favourable" to the instigator or "pitched to allow too much instigation" will be partially dependant upon how far Parliament, in its legislative wisdom, determines is appropriate for the law enforcement officials or their agents to proceed in the enforcement of criminal prohibitions. Who better than Parliament, as representative of public policy, to control the activities of its law enforcement officials by prescribing permissible limitations for their conduct. Also, whether such an offence would be pitched to allow too much instigation or be too favourable to the police would depend to a large extent on how the courts, as guardians of our individual freedoms, will interpret the proposed legislation.

It is therefore concluded that the prosecution of an offending law enforcement official either under existing legislation for the instigation of a criminal offence or for the commission himself of another offence, or, even more appropriately, under the provisions of a proposed offence of entrapment would serve as an effective means of deterring entrapment.

CHAPTER TWELVE

CONCLUSIONS

It is concluded that a substantive defence of entrapment is neither effective in achieving the desired objectives of the doctrine of entrapment nor is it appropriate having regard to the fact that the accused admittedly intentionally committed the offence alleged, having as his only defence the fact of official inducement.

J. D. Heydon concluded that the recognition of a substantive defence of entrapment appeared to be "too crude a method of dealing with the problem of entrapment practices." He further stated as follows:[478]

> Such practices are used is a wide variety of situations and include very different kinds of conduct. Given that some forms of entrapment are permissible and some dangerous, and that the factors which distinguish them are complex, it seems better that the process of drawing this distinction should not be through a substantive defence ajudicated upon by the jury, but instead through the law of illegally obtained evidence, the court's discretion in sentencing, and the possibility of prosecuting police offenders in extreme cases.

As the exclusion of evidence has been rejected as being inappropriate in achieving a desired objective of the doctrine of entrapment, it would be correct to conclude from the statement of Heydon that the difficulty of responding to the problems presented by the practice of entrapment can most effectively be dealt with by the court's discretion in the mitigation of sentence and the prosecution of the offending law enforcement officials and their agents, either under existing legislation, or, more appropriately, under the provisions of a proposed offence of entrapment.

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[478] *Supra*, n. 11 at 285

Lord Scarman in R. v. Sang, in rejecting the defence of entrapment, concluded that there are "other more direct, less anomalous, ways of controlling police and official activity than by introducing so dubious a defence into the law."[479] Based upon these fundamental objections to a defence of entrapment, the Law Commission felt they were "unable to recommend a defence in any form." The Commission further expressed the opinion that the trial level is an unsatisfactory stage at which to take preventative measures to curtail entrapment practices.[480]

As the accepted rationale for a doctrine of entrapment is the control of the undesirable conduct of law enforcement officials in the instigation of criminal offences, to provide an appropriate remedy to an aggrieved accused who is the victim of an entrapment situation, and to provide a means whereby the integrity of the court can be maintained, it is concluded that these objectives can most effectively be achieved, not through a substantive defence of entrapment which fails to acknowledge the guilt of the instigated offender, but rather by a combination of techniques. The most appropriate and effective combination of techniques would involve the discretion of the court to mitigate the accused's penalty in the sentencing process, together with the prosecution of the offending law enforcement official or his agent. The mitigation of sentence would permit the court to provide a remedy to the accused which would be considered appropriate having regard to all of the surrounding circumstances. Additionally, such a remedy would protect the integrity of the court by permitting them to reduce the sentence appropriately, even to granting an absolute discharge, which of course would require an appropriate amendment to the Criminal Code. The prosecution of the offending law enforcement officer or his agent would serve as a most direct and effective means of deterring the continuation of the undesirable conduct.

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[479] Supra, n. 32 at 1243

[480] Supra, n. 43 at 48

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